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THE
MADRAS LAW JOURNAL.

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THE LATE SIR MURRAY COUTTS TROTTER, KT.

REFERENCE IN THE HIGH COURT.

On the re-opening of the High Court after the summer recess, the Advocate-General made a reference before a full Court to the death of Sir Murray Coutts Trotter during the vacation. He paid an eloquent tribute to the late lamented Judge in a speech so carefully and appropriately worded that it is needless, if not also difficult, to add anything to it. It was, indeed, unfortunate that failing health made it impossible for Sir Murray in later years to fulfil the expectations which the earlier years of his career even in Madras raised and it must have pained his friends and admirers to note the voice of disappointment finding expression even in discussions raised in the Legislative Council suggesting that in that state of health it was scarcely possible for him to do full justice to the onerous duties of his high office. Now that the time has come for all controversy to be hushed, we have no doubt every one will join in the tribute to his memory.

The Advocate-General said:—

My Lords, we are meeting this morning under the shadow of a great loss which this Court and Madras have sustained in the death of Sir Murray Coutts Trotter, our late Chief Justice, who adorned this Court with distinction both as Puisne Judge and Chief Justice for the last 14 years. I was shocked to hear the news of his sad and untimely demise under most unfortunate circumstances on the railway platform on my arrival from Simla during the holidays. The tragedy of the news was enhanced and the poignancy of the grief rendered all the more acute by the fact that only the day before I left Madras in spite

of his weakness and failing health he very kindly attended a function arranged by me in honour of the Hon. Mr. Justice Odgers and took part in it. Later I received a touching and feeling letter of good-bye from him when I was at Simla. Only the other day another letter of good-bye breathing affection and good will addressed to the Madras bar on the day of his departure from Madras was handed to me by the Registrar. I never dreamt that it would fall to my lot so soon to bring to your Lordships' notice this sad event or to take part in this function of paying my humble tribute to the memory of one whom we all loved and respected.

In many ways Sir Murray was a unique and striking personality. After a brilliant and distinguished career at the English Universities and after being elected Eldon Law Scholar in 1898 and serving as a Deputy Professor of Greek for some time in the University of Liverpool he was called to the Bar by the Inner Temple in 1901 He read in the chambers of Hamilton, K.C., now Lord Sumner and of Mr. Justice Lush for some time, joined the north-eastern circuit and soon established a good practice. He was appointed Lecturer on the Law of Evidence in the University of Oxford in 1912 and at the comparatively early age of 41 he was sent out as a Puisne Judge of this High Court and he became Chief Justice in 1924. His Majesty the King in recognition of his distinguished services conferred upon him the Knighthood early that year.

Words fail me at this moment to give adequate expression to my feelings of regard and affection for him. He had a sharp and incisive intellect which could straight go to the heart of a case involving complicated questions of facts and law. His mind moved so swiftly that he was sometimes apt to be impatient of those who were accustomed to a more leisurely progress Though he was unduly modest in calling himself a pure common lawyer unacquainted with the vagaries of English Equity and Indian Statute Law and Tenure, he was equally at home in dealing with a complicated question of English Equity or the construction of an Indian Enactment or with an abstruse point of Hindu Law. The only thing he dreaded—though it cannot be said that even this was not within his grasp for I well remember leading cases of his on the Estates Land Act—was an excursion into the realm of Indian Land Tenure. With a characteristic distrust of a long citation of case-law he had the art possessed by the great masters of the law in England of stating the effect of a long string of cases in the form of a few terse pro-

positions. He had the rare faculty of delivering illuminating and able judgments ex tempore. In the early days of his judicial career I remember how he, sitting with the late Sir K. Srinivasa Iyengar, delivered ex tempore judgments in cases of great magnitude and complexity without faltering for a word, phrase or an idea. In fact, one might be pardoned for saying that his ex tempore judgments were even better from the point of diction, matter and cogency of reasoning than his reserved judgments.

Steeped in classics he commanded an easy terse, perspicuous and racy style—a directness and force of expression seldom excelled by Judges English or Indian in this country and he had a natural distrust of all forms of verbiage. After a long and protracted argument it was refreshing to note that he could express in a few pithy and striking sentences what the counsel might have struggled to convey to the court and it has fallen to my lot on more than one occasion to convey my indebtedness to His Lordship in that respect.

It cannot be said of him as of the ideal Judge that be the case good or bad, easy or uphill, counsel went before him as before a friend. But while his emphatic, if somewhat too emphatic manner which carried with it an air of impetuosity was occasionally embarrassing and disconcerting to the counsel that appeared before him he had that rare quality characteristic of all great Judges of being open to conviction till the last. A counsel that believed in his point and in the righteousness of his cause need never despair of convincing him up to the last moment and the counsel would be really committing a suicidal act if he desisted from pressing a point on account of the strong expressions of His Lordship's opinion in the early stages of a case.

While he had a legitimate distrust of a court ignoring the plain terms of an enactment and reading an equity into a statute he always approached the construction of taxing enactments from the right perspective. He inherited the great tradition of English Judges that the court is the guardian of the liberty of the subject. While he sedulously administered the law, he had the sympathetic imagination of appreciating even the view-point of one who might be led astray by political idealism. His Lordship was an exponent of the best traditions of the English Bar in that he realised that the Bench and the Bar alike are the component parts of the machinery of the administration of justice, though engaged in different spheres. In the later years of his career one noticed his failing health was not quite equal to the

strenuous work of a Chief Justice, but even then one did not perceive any impairment of his intellectual faculty. Sir Murray took a keen and abiding interest in the public movements of this City and especially in the education of this presidency. He was an active member of the Senate and the bodies connected with it and his influence was deeply felt in the counsels of the University. I well remember how on occasions when the debate was straying possibly into irrelevant channels he would cut into the debate, make an imprompt speech and decide the fate of a resolution.

In his personal relations he was warm hearted and generous if to a fault and was absolutely free from rancour of any kind. As one of his intimate friends used to frequently mention to me, Sir Murray was essentially human and that was the strength and weakness alike of his character. He commanded a lively humour, a sparkling wit and a power of narrative. He had a genuine appreciation of young intellect and took a delight in discerning and discovering talent wherever it lay. He was free from racial bias of any kind, had a belief in England's mission to this country and in India's great destiny.

My Lords, so far as I am concerned, it is a great personal loss to me. I have known him intimately ever since he landed in this country and I was the recipient of many acts of kindness at his hands while still a junior at the Bar.

In him the High Court has lost a great and distinguished Judge, His Majesty's Government a trusted servant of the State, the Bar a valued friend and Madras a public-spirited citizen. There is a number of personal friends of his to bemoan his loss. On behalf of the Bar I would convey through Your Lordships our condolences to Lady Coutts Trotter and the members of the bereaved family.

The Chief Justice said:—

Mr. Advocate-General, two and half years ago references were made in this Court from the Bench and by the Bar to our late colleague on the Bench Mr. C. Krishnan. To-day we have met to pay our last tribute to the memory of Sir Murray Coutts Trotter, our late Chief Justice and our friend, the news of whose tragic and sudden death reached us during the vacation. To the majority of us his death was so unexpected. Few of us who saw him and who were with him during the last week he spent in Madras and who witnessed his departure and bade farewell ever imagined that

within eight days he might be dead. But we knew him to be very ill. We did not realise at that time that the hand of death was upon him. After 14 years of service in this High Court, for nine years as Puisne Judge and five years as Chief Justice, he was on his way home to retire and to enjoy a well-earned rest to which he had so long been looking forward. But, however, he was not destined to reach home and see his family to whom I am personally aware he was very deeply attached. But his family and ourselves, his friends, may derive some consolation from the knowledge that during the last few hours he was not entirely alone or friendless. He had a friend from this High Court. Master White travelled with him and was with him and personally attended on him right up to the time of his death. We must pay a just and high tribute to the great courage of Sir Murray which enabled him to attend his Court almost down to the last that it was only when his illness became so acute that it prevented him leaving his residence. We must all of us fully appreciate what that effort to work must have caused him.

Mr. Advocate-General, Sir Murray came to this country with a reputation for brilliant scholarship which few, if any, have had when they came to this country either before or since. His career at the school and at the University was indeed a brilliant one. He was for two years the head boy and Captain of St. Paul's School, one of the most important public schools in England and certainly one of the largest. From there he went to Balliol with a scholarship and in 1895 won one of the most coveted prizes in the University. In 1898 he also won the Eldon Law Scholarship and in the same year was appointed Deputy Professor of Greek in the Liverpool University. Then he was called to the Bar in January, 1901 and I may perhaps be pardoned for saying something about his earlier days at the English Bar. I have known Sir Murray since I was called to the Bar one year later than himself, 27 years ago and more, although I cannot possibly claim to have known him longer than any one else in Madras. I knew him at the commencement of his legal career. He and I both belonged to the same Inns of Court, Inner Temple, and we were constantly meeting there. There I soon came to recognise as did everybody else in the Temple who came in contact with him that he was a very brilliant and a witty conversationalist and possessed a keen sense of humour. He became very rapidly known as a sound and able lawyer and one who given health, opportunity and

ordinary good fortune might win the highest prize at the bar. He was pupil to Lord Sumner and unless he had been known to be a sound lawyer he would never have been in those chambers.

Of him as a Judge some of my colleagues on the Bench are better qualified than I to speak because they knew him in his early days on the Bench. But this I can say, that he had a profound knowledge of English Case Law, quickness of perception, mastery of facts which astonished everybody who appeared before him or sat beside him on the Bench. His quick disposal of cases on the Original Side soon won for him the strongest admiration. As you have quite rightly said, Mr. Advocate-General, he shone particularly when he delivered an oral judgment which he frequently did at the close of long, intricate and complicated arguments. His marshalling of the facts, each one in its proper order, his concise treatment of the law and his easy and happy choice of words was remarkable. Even at the end when he was ill he was still able to deliver oral judgments from the Bench at the conclusion of an argument to which it was like an education and a pleasure to listen.

As a friend he was one of the most loyal. He was possessed of a warm nature which enabled to make friends freely and he had made them to keep them. He was in many ways a simple man. He had a wide sympathy for all who were in trouble and needed help, from the struggling junior at the Bar to the underdog. I never knew him to bear malice to anybody. We have lost a loyal friend and we feel the loss so keenly. We desire to convey to Lady Coutts Trotter and the members of Sir Murray's family our deep sense of loss they have sustained and our sincere sympathy with them.

THE FAREWELL LETTER.

Dear Mr. Advocate-General and Gentlemen of the Madras Bar:

The best of friends must part and I have been ordered home on medical advice not to return to India. I wish to thank through you the Madras Bar for the great assistance its members have always given me in the trial of cases by their learning and industry. Without such loyal co-operation as I have received, the Judge's work would be crippled, indeed practically impossible for him.

I have also to thank you all for unfailing courtesy, patience and forbearance with my many faults for which I crave for-

giveness. Patience, I am afraid, is not a virtue of mine. But I am now told by my doctors that the illness which is causing me to retire has doubtless been at work for a long past and I hope it will be accepted as in part an excuse for any discourtesy or impatience I have shown towards the Bar.

Apart from professional relations I have formed many pleasant friendships at the Bar, among which I value your own not the least. I part from my friends out here with the greatest reluctance and at Home I shall often recall many of you and think of old battles waged before me. I wish you all every success and prosperity and so once more good-bye.

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DEFAULT CLAUSE IN CHIT FUND SECURITIES.

The security bond given by a prize-winner in favour of the karaswan (or stake-holder) of an auction-chit-fund is intended to secure the payment of the future subscriptions due by the prize-winner. The amount secured by the bond includes the premium charged against the prize-winner for distribution among the "non-benefited" subscribers by way of solatium to them. That distribution takes the shape of a deduction from the amount of individual subscription payable for the auctioned instalment.

An illustration of the working of an auction-chit-fund, the karaswan and the subscribers of which are content with a moderate rate of interest, may be given here. A is the karaswan, and B, C, D and E are the four other subscribers. The annual subscription payable by each member is Rs. 1,000, and he is to pay at that rate for five instalments (or years). The total subscription for the first instalment, (*viz.*, Rs. 5,000) goes to the karaswan, and that for the last instalment goes to the subscriber who has not drawn the prize at any of the intermediate instalments. The subscription at each of these intermediate instalments is available for loan to the successful bidder at the auction. The member who has the most pressing need for the loan offers the highest premium or bonus in consideration therefor, *i.e.*, he offers to accept the lowest proportion of the total subscription, (*viz.*, Rs. 5,000). Accordingly, he is declared the prize-winner.

The chit-karanama takes care to provide that the premium is to be not less than Rs. 500 so as to ensure a reasonable minimum usury or compensation for the grant of the loan. If at any particular auction, no member is willing to offer the minimum premium of Rs. 500, the kararnama prescribes that the prize is to be decided by casting lots and the prize-winner by the event of the lot has to pay the minimum premium of Rs. 500.

The security bond to be given by the prize-winner as a preliminary to his receiving the prize-money, will purport to be for the full amount of the instalments yet to come.

Let us take the case of C in the following tables. He is the prize-winner at the 3rd instalment; the premium offered by him is Rs. 600; that sum is divisible between D and E who are by then the only non-benefited subscribers. The security bond to be executed by him will purport to be for Rs. 2,000, being the amount due for the fourth and fifth instalments yet to come. The bond will recite that a sum of Rs. 2,000 was paid back to C in respect of his subscriptions for the past two instalments; and it will further recite that excluding the premium of Rs. 600, the actual cash consideration paid by the karaswan to C was Rs. 1,400.

In fact and truth, as a result of the prize, C will get Rs. 3,400 net, *i.e.*, after deducting the premium of Rs. 600 and a further sum of Rs. 1,000 due for the third instalment. Rs. 2,000 out of the Rs. 3,400 represents substantially his past subscriptions, which aggregated to Rs. 1,750, with interest thereon at a little less than 10 per cent. The bond will contain the usual default clause that if C should fail to pay any of the future instalments on the due date, the entire balance of the secured debt of Rs. 2,000 and interest thereon at a stipulated rate will be payable from the date of default.

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The accompanying tables require no further elucidation.

TABLE I.

Time of Prize.	Prize-Winner.	Amount of premium, and divisible among whom.	Nominal amount of the security bond, *i.e.*, the amount of the future instalments payable by the prize-winner.	Recitals of consideration in the security bond.	Total net cash received by the prize-winner deducting his subscription for the auctioned instal-[illegible]
1	2	3	4	5	6
1925 January.	A	Nil.	Rs. 4,000	Rs. 4,000 paid in cash t[illegible]	Rs. 4,000.
1926 January.	B	Rs. 750 divisible among C, D & E at Rs. 250 each.	Rs. 3,000.	(i) A recital that as per a separate voucher B received Rs. 1,[illegible] the full amount of his past subscription, (ii) and a further recital that Rs. 750 in the way of premium, and Rs. 2,250 in the way of cash received by B, go to make up the Rs. 3,000 for which the bond is passed.	Rs. [illegible],250.
1927 January.	C	Rs. 600 divisible between D & E at Rs. 300 each.	Rs. 2,000.	(i) A recital that as per a separate voucher, C received Rs. 2,000, the full nominal amount of his past subscriptions, and (ii) a further recital that Rs. 600 in the way of premium, and Rs. 1,400 in the way of cash received by C, go to make up the Rs. 2,000 for which the bond is passed.	Rs. 3,400.
1928 January.	D	Rs. 550; it goes to E alone.	Rs. 1,000.	(i) A recital that as per a separate voucher, D received Rs. 3,000, the full nominal amount of his past subscriptions, and (ii) a further recital that Rs. 550 in the way of premium, and Rs. 450 in the way of cash received by D, go to make up the Rs. 1,000 for which the bond is passed.	Rs. 3,450
1929 January.	E	Nil.	Nil.	Nil.	Rs. 4,000.

TABLE II.

Prize-winners.	The full nominal amount of the prize-winner's past subscriptions (before the time of the prize).	Actual amount of past subscriptions paid by the prize-winner (before the time of the prize).	Rate of interest involved by the karaswan's repayment to the prize-winner of the full nominal amount of the past subscriptions of the prize-winner.
1	2	3	4
A	Nil.	Nil.	Nil.
B	Rs. 1,000.	Rs. 1,000.	Nil.
C	Rs. 2,000.	Rs. 1,750.	Little less than 10 p. c.
D	Rs. 3,000.	Rs. 2,450.	Little less than 11 p. c.
E	Rs. 4,000.	Rs. 2,900.	Little less than 14 p. c.

In the generality of cases coming before the Courts, the proportion of premium to the actual money received by prize-winner, is much higher; and the rate of interest involved by the karaswan's repayment of past subscriptions as per Col. 4 of the second table above would be correspondingly higher. Likewise, the rate of interest prescribed by the default clause in the chit-security bonds put into Courts is usually exorbitant and fearful. One way to check this evil is by a judicious use of section 74 of the Contract Act and section 3 of the Usurious Loans Act.

Two views are possible as to the distinctive character of the premium in chit-fund securities. One view is that it is a fee or a bonus for the very grant of the loan to the prize-winner and that the term as to the repayment by instalments is a sheer concession and a thing of grace which can be withdrawn on the borrower's default. This view sounds harsh and has not received judicial acceptance.

The other view is that the premium represents the price paid by the borrower in consideration of the term that the loan is to be repaid in instalments to be spread over a defined period. The principal loan and interest in advance, are added together, the total sum due being made repayable in equal instalments; and, upon default in payment of any instalments, the whole balance is to become due with a stipulated rate of interest. In

short, the case is covered by Ill. (*g*) to section 74 of the Contract Act; and relief may be granted in accordance therewith. That view was first enounced by the case in *Ramalinga Adaviar* v. *Meenakshisundaram Pillai*[1] and three subsequent cases have approved of it—*Tatayya* v. *Gangayya*,[2] *Subbiah Pillai* v. *Shanmugam Pillai*[3] and *Muthukumaraswamiah Pillai* v. *Subramaniah Chettiar*[4] (Cf *Velchand* v. *Flagg*[5]).

Those cases proceed on the ground that the effect of the default clause is not a mere acceleration of a debt existing from the outset, but that the debt itself comes into existence piecemeal as the instalments fall due, and that the enforcement of the default clause as to the precipitation of the whole sum, coupled with the high rate of interest thereon, would be a double penalty.

The actual decision in *Ramalinga Adaviar* v *Meenakshisundaram Pillai*[1] and *Subbiah Pillai* v. *Shanmugam Pillai*[3] was that the karaswans' claim on the security bonds given by the prize-winners, could be decreed only to the extent of the instalments in default by the date of the suit, with reasonable compensation thereon; and the larger claim of the karaswan to recover the whole of the unpaid balance of the secured debt was disallowed. Here it may be observed that in the case in *Muthukumaraswamiah Pillai* v. *Subramanian Chettiar*[4] interest in respect of the 3rd, the 4th, and the 5th calls was decreed on the amount of the calls, and not on the whole of the unpaid balance of the secured debt.

The only statutory limit to the reasonable compensation for breach of contract, recoverable under section 74 of the Contract Act, is that it must not exceed the stipulated penalty or the sum named in the contract as the amount to be paid in case of such breach; and this is so, whether or not actual damage or loss is proved to have been caused by the breach. Neither the letter nor the spirit of the section would be violated, if in a proper case, on the prize-winner's default, the Court should substantially decree, the karaswan's claim for the entire balance of the secured debt payable by the prize-winner (see *Velchand* v. *Flagg*,[5] where it appears that "at the time of the suit the 39 months' period had not expired").

Apart from section 74 of the Contract Act, the borrowing prize-winner may, in a deserving case, get relief under section 3

1 (1924) 47 M.L.J. 833 2 (1927) 53 M.L.J. 562 at 564, 568.
3 (1927) M.W.N. 527 4 A.I R. 1927 M. 1105.
5. (1911) I.L.R. 36 B 164.

of the Usurious Loans Act, provided, of course, the interest is excessive and the transaction was substantially unfair as between the parties.

Clause (2) (*b*) of the section specifically enacts that in considering whether interest is excessive under the section, the Court shall take into account any amounts charged or paid for fines, bonuses and premia; and clause (2) (*d*) of the section provides that in considering whether a transaction was substantially unfair, the Court shall take into account all circumstances tending to show that the transacion was unfair, including the necessities or supposed necessities of the debtor at the time of the loan so far as the same were known, or must be taken to have been known, to the creditor. The explanation says that interest may of itself be sufficient evidence that a transaction was substantially unfair.

In the case of chit-fund securities, the high rate of interest involved in the premium goes with the notorious fact that the loan (or prize-money) is knocked down to the person who offers the highest premium because of his greatest need; others in lesser need offer only lesser premium. Furthermore, the prize-money is handed over to the prize-winner only on his furnishing safe and ample security.

No doubt, the rate of interest must vary with the risk run; and the risks and responsibilities of a karaswan are serious, as recognized in *Vaithianatha Aiyar* v. *Govindaswami Odayar*.[6] But, in a deserving case, even that is not a sufficient ground for refusing relief under the Usurious Loans Act. Under section 3 (1) (*b*) (iii) of the Act, the Court may set aside either wholly or in part or revise or alter any security given in respect of any loan (cf. *Kering Rupchand & Co.* v. *Bayley*[7]).

K. C. G.

SUMMARY OF ENGLISH CASES.

FORSTER, *In re* SOMERVILLE *v.* OLDHAM, (1929) 1 Ch. 146: 98 L.J. Ch. 27.

Settlement—Law of Property Act, 1925*—Legal estate with the personal representatives—Trustees under settlement not calling for legal estate after* 1925*—S.* 35, *Law of Property Act,* 1925.

By a settlement, the settlor had transferred all her interest in her lands to trustees to stand possessed of the same in trust

6. (1921) 42 M.L.J. 551. 7. (1919) I.L.R. 44 B. 775.

for herself and her husband during their joint lives or during the life of the survivor or in the case of her husband until his remarriage if any and after that in trust for their children in such shares as she, the settlor, should by her will appoint. By a later will of 1915 she effectually exercised her power of appointment and consequently the settled property in equity belonged absolutely to her two daughters in different shares. Before 1925, the husband remarried and the question arose whether the property was vested in the trustees of the settlement or in the personal representatives of the settlor or in the two daughters as joint tenants.

Held, before the Property Act of 1925, the trustees of the settlement were entitled to call upon the settlor's personal representatives, in whom the legal estate was outstanding, to execute a conveyance of the property to them. But they never exercised that right. Now the land being held by the personal representatives in trust for persons entitled in undivided shares, the personal representatives became trustees for sale under S. 35 of the Act and may sell the property, if the two ladies do not elect to call for a conveyance of the property to themselves as joint tenants upon the statutory trusts.

WINDSOR STEAM COAL CO., LTD., *In re*, (1929) 1 Ch. 151.

*Company—Liquidator—*Bona fide *settling a claim made against the company—Claim found invalid—Liquidator not consulting shareholder or obtaining Court's sanction for the settlement—If liable to repay the amount to the company—Liquidator if a trustee—Trustee Act of* 1925, *Ss.* 30 *and* 61—*Companies Act,* 1908, *S.* 215.

The liquidator of a company—a professional chartered accountant—without taking the sanction of the Court or referring the matter to a general meeting of the shareholders, settled a claim made against the company by another firm and paid it. The courts in this action found the claim to be baseless and invalid. No charge was made against the liquidator's *bona fides* or his professional or personal honour. An originating summons was taken out against him to recover the amount on the ground that by having acted on his own responsibility at a time when he need not have done so, he has in fact misapplied moneys of the company. Mr. Maugham held that the liquidator was not a trustee within the meaning of the Trustee Act, 1925, and that, therefore, S. 30 of the Act did not apply.

On appeal, the Court of Appeal, without deciding whether the liquidator was a trustee, *held* that even if he were, he was

not entitled to the indemnity given by S. 30, as that section does not apply when there is no loss within the meaning of that section but only a misapplication of funds coming to the liquidator's hands; nor could the breach be excused by the Court under S. 61 as the liquidator could not be said to have acted *reasonably*. The liquidator by having applied money without caution to the liquidation of a claim not sustainable by the firm is liable under S. 215, Companies Act, 1908, as for misapplication of moneys coming to his hands.

Even treating him as an agent, he is liable as he was negligent in respect of his principal's business.

Per Lawrence, L. J.—Even if S. 215, Companies Act, had not existed and an action had been brought against the liquidator as a trustee, an ordinary account would have been directed of his receipts and payments, and every payment which could not be vouched as having been properly made under the trust would be disallowed and he would be treated as still having in his hands the balance found to be due from him.

A DEBTOR, *In re*, (1929) 1 Ch. 170: 98 L. J. Ch. 35.

Bankruptcy—Landlord and tenant—Judgment for rent—Tenant's default in payment—Bankruptcy notice by landlord—Landlord's notice to under-tenants to pay direct to him—Receipt of a portion of arrears from under-tenants—If precludes landlord's continuance of the bankruptcy proceedings

A landlord obtained judgment against his tenant for arrears of rent due and later served a bankruptcy notice based on that judgment. The notice not having been complied with he filed a petition in bankruptcy against the debtor. Before the petition came on for hearing, the landlord acting under S. 6, Law of Distress Amendment Act of 1908, received some arrears directly from the under-tenants and there still remained due to him a debt sufficient to sustain the petition.

Held, that notwithstanding the fact that the landlord had exercised the power given to him under the Law of Distress Amendment Act, 1908, to recover from the under-tenants directly, he was not precluded from proceeding under the bankruptcy notice if he still has a debt of over £50 due to him.

Per Lord Hanworth, M. R.—The remedy under S. 6 of the Law of Distress Amendment Act, 1908, is simply to prevent loss being suffered; it is a remedy which may save assets which might otherwise go to the debtor,

A. AND C. BLACK, LIMITED *v.* CLAUDE STACEY, LIMITED, (1929) 1 Ch. 177.

Copyright—Infringement of—"Who's Who," a compilation of biographies—Copyright in the sketches of lives—If in compiler or the person who supplies the particulars of his life.

The defendants copied several passages from the plaintiffs' work "Who's Who"—a compilation of biographies. In its compilation, a questionnaire is sent out to the person whose life is to be put in and he gives a short sketch of his life for publication In an action for infringement of the copyright, it was contended that the copyright in the order and arrangement of the compilation was in the plaintiffs but that the copyright if any in the several entries were in the persons to whom it refers and who supplied the sketches, as they are the authors of the passages.

Held, the information given by the authors is not given otherwise than as material available for use by the compiler and by incorporating it in his book the compiler acquires a copyright in it. The author of it has no copyright in it.

In re F. AND E. STANTON, LIMITED, (1929) 1 Ch. 180.

Company—Winding up—Actual issue of debentures within three months of winding up—Cash paid before and in consideration of debentures—Fraudulent preference—Validity of charge—Time of creation of charge.

The respondents, to whom already a sum was owing by the company on advances and account, made a substantial advance to the company to help the company to tide over its temporary shortage of cash and put it on its legs again. The advance was made relying on a promise by the director to execute and issue debentures covering that amount. The actual issue of the debentures was delayed for more than 50 days though the respondents repeatedly requested the director to promptly execute them. Within three months of the actual issue of debentures but more than 3 months after the payment of cash, the company went into liquidation and the question arose if the charge created by the debentures was not void under S. 212 or a fraudulent preference under S. 210 of the Companies Consolidation Act, 1908.

Held, (*i*) that moneys having been advanced on an actual obligation by the company to give security, the giving of the security on the verge of bankruptcy did not constitute a fraudulent preference, and (*ii*) payments made on account of the considera-

tion and in anticipation of the creation of and in reliance on a promise to execute debentures must be deemed to have been made *"at the time of"* its creation within the meaning of S. 212 unless the delay in the issue of the debenture is one which the creditor has himself procured or suggested, or if the delay is one in which he has in any sense acquiesced and the respondents who were repeatedly requesting the directors to issue the debentures could not be said to have voluntarily acquiesced in the delay or procured it.

ACKLOM, *In re.* OAKESHOTT *v.* HAWKINS, (1929) 1 Ch. 195.

Will—Bequest of house to sister for life or so long as she wished to reside there—Absence abroad with intention to return—Subsequent staying out long but letting the house—If ceased to reside.

By his will, a testator bequeathed his house, etc., to his trustees upon trust to permit his sister to reside there after his death if she should wish to do so and to have the use and enjoyment thereof during her life or till she should not wish to reside or continue to reside in the said house. The sister entered into possession and resided there for some years but on grounds of health went abroad intending to return soon, but as she was prevented from illness from returning, she let the house from time to time and continued to pay the tax thereon.

Held, that in the absence of evidence that at any particular date she had finally and irrevocably decided not only not to continue to reside but not to let the house under her powers as tenant for life, she had not ceased to reside in the house.

In re PINTO LEITE AND NEPHEWS. *Ex parte* VISCONDE DES OLIVAES, (1929) 1 Ch. 221

Bankruptcy—Proof—Right of trustee to set off as against the assignee of a debt due by the bankrupt, debts due from the assignor to the bankrupt—Debt payable at date of assignment—Obligations out of which the debt arose existed prior to assignment but debt itself matured after—Assigned debt payable in future.

In 1918, *A* agreed with *B* to leave a debt of 100,000*l.* in deposit with him until 1932 on certain terms. In 1920 the debt was at the direction of *A* transferred to *C* in *B's* books and *C* likewise agreed to leave it in deposit as before. In 1926 *C* trans-

ferred the debt in equity to *D* and on March 2, 1926, gave notice of the transfer to *B*. A page was opened in *D's* name in *B's* books and the sum of 100,000*l*. credited to him. On 15th March *B* was adjudicated bankrupt Before the 2nd March, there was a sum of 10,000*l* due to *B* from *C* and between the 2nd and 15th another sum of 15,000*l*. became due to *B* as for amounts expended by *B* in taking up acceptances, for which as between *B* and *C*, *C* had become bound to provide funds before the 2nd. The question arose if these two sums can be set off against *D's* claim for 100,000*l*.

Held, (1) As for 10,000*l*—Though in certain circumstances the fact that *B* entered 100,000*l*. in *D's* name in his books may be taken as evidence that the firm recognised the transfer to be one which was to be free from cross-claims as between *B* and *C* thus waiving their right to set off, in this case there is nothing to show that it was intended to waive the set off. It was so made only to record the fact of transfer of *C's* rights to *D* and not to waive.

(2) As for 15,000*l*.—Though *C's* liability for this sum arose out of a liability which existed before 2nd March, the date of notice, yet as the money became a debt due and payable by *C* to *B* only after *B* paid it, it was not *debitum in presenti* and therefore it cannot be set off against *D*. The fact that the assigned debt to *D* is payable in future does not matter as even then a set off can be had only if the debt so to be set off was *debitum in presenti* at the date of notice of transfer.

Jeffryes v. *Agra and Masterman's Bank*, (1866) L.R. 2 Eq. 674 discussed and explained

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In re FRANKLIN AND SWATHLING'S ARBITRATION, (1929) 1 Ch. 238: 98 L.J. Ch. 44.

Partnership—Deed of partnership authorising nomination of successor by a partner—Admission of nominee subject to the consent of general partners—Consent, not to be unreasonably withheld—Partners and the nominee entitled to refer to arbitration if consent unreasonably withheld—Death of partner—If nominee can refer to arbitration—Nominee, if a party to the submission within the meaning of Arbitration Act, S. 5.

Under a deed of partnership, a general partner had a right to nominate his successor by will and the admission of the nominee was to be subject to the consent, not to be unreasonably withheld of the general partners voting at a meeting of the partners. If consent were unreasonably withheld the general

partner or the qualified nominee could refer the matter to arbitration. An otherwise proper nominee was refused admission at a meeting of the partners and the applicant had a right under the deed to have the question whether consent was unreasonably withheld referred to arbitration

Held, as the applicant was not a party to the original deed and he cannot be treated as a representative of the partner as he has not yet become a partner, the consent having been withheld, he was not a party to the submission.

In re VILLAR. PUBLIC TRUSTEE *v.* VILLAR, (1929) 1 Ch. 243.

Will—Residuary gift in favour of issue living at the end of 20 years of the death of the last of Queen Victoria's lineal descendants living at testator's death—Impracticability of ascertaining date of such survivor's death—Gift if valid.

By his will, a testator bequeathed his property in favour of trustees to deal with the income and capital as per the directions in the will and to convey the residue to his issue (including in issue, his lineal descendants also)living at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at his death

Held, that though the ascertainment of the end of the period may be difficult in time to come, the vesting was not suspended beyond legal limitations and did not transgress any rule of law at the present time. Also the persons to take under the gift being clearly defined and the event on which they are to take also equally clearly defined, there is no uncertainty either, rendering the gift void.

PROFITS AND INCOME INSURANCE CO., *In re,* (1929) 1 Ch. 262.

An actuary and secretary of an insurance company resigned and the directors granted him a pension. Subsequently the company was ordered to be wound up compulsorily and the late actuary and secretary lodged a claim in respect of his pension after that date, but before the liquidator could assess it, he died. The question arose if the pension was to be valued as an annuity within the meaning of the Assurance Companies Act, 1909, in which case the widow would be entitled to a capitalised value of the annuity as per mortality table or if she was entitled only

to the actual pension earned up to the date of his death under the Companies Act of 1908.

Held—The minute recording the resolution of the Board to pay him a pension was an instrument evidencing a contract to pay an annuity and is, therefore, a policy within the meaning of the Assurance Act. Also the consideration for an annuity on human life need not be cash or its equivalent.

In re SANDWELL PARK COLLIERY CO. FIELD *v.* THE COMPANY, (1929) 1 Ch. 277.

Vendor and purchaser—Vendor, receiver in a debenture-holders' action—Conditional contract—Sale subject to approval and sanction by Court—Date fixed for completion of contract but none for obtaining sanction—No sanction obtained before date for completion—Repudiation of contract by purchasers—Return of deposit with interest.

In a debenture-holders' action in the usual form, the receiver entered into a conditional contract whereby the defendants agreed to purchase certain lands, and deposited a portion of the price with the receiver, the sale to be completed by a fixed date. The contract was made subject to the approval and sanction of the Court but no time was fixed for obtaining the sanction. The said sanction was not obtained within the time fixed for the completion of the sale and the purchaser thereon repudiated the contract and demanded return of the deposit with interest.

Held—Where no time is fixed for obtaining the approval of the Court to the sale, the approval must be obtained within a reasonable time. A condition precedent to the validity of a contract for sale of land must *prima facie*, in the absence of express provision, be fulfilled before the date fixed for completion of the contract, and further the receivers having delayed long were not entitled to claim specific performance either and as such the purchasers were entitled to a return of their deposit with interest earned by such deposit since it was paid to the vendor.

In re HOBSON, HOUGHTON AND CO., LTD., (1929) 1 Ch. 300.

Company—Articles of Association—Restriction on transfer of shares—Liberal construction of—Transfer by executors and trustees as trustees—If can be read as by executors.

A testator appointed his wife, a son and two other persons executors and trustees of his will and after giving certain

other pecuniary and specific legacies bequeathed the residue to trustees on trust to sell and hold the proceeds in trust for a portion of it for one son and the rest for the other children living at his death. The residue included 1,850 shares in a company. The wife and the son who alone proved the will, caused the said shares to be registered in their individual names. Later they appointed another trustee of the will and executed a transfer deed vesting the shares in all the three but the company refused to register it on the ground that the transfer was only a transfer by trustees of the will to themselves and another trustee and not a transfer by *"executors of a deceased member to trustees for sons or daughters"* or a transfer by *"members to trustees for sons or daughters of themselves or one of them"* within the meaning of those words in the Articles.

Held, that Articles of Association should be so construed as not unreasonably to prevent shareholders in a company from enjoying a fair and reasonable exercise of their powers as members of the company. Though the widow and son executed the transfer as *trustees,* the transfer may be justified as being by them as *"executors."*

In re WILTS AND SOMERSET FARMERS, LIMITED, (1929) 1 Ch. 321: 98 L. J. Ch. 17.

Company—Alteration of rules—Alteration under which members were to take additional shares—If intra vires*—Liability to contribute in voluntary liquidation.*

By a society's original rules and amendments, an individual member was to hold at least one share for every 20 acres farmed by him but by a later resolution each individual member was required to hold at least five shares for every twenty. By the rules, the society had the power to alter rules by a resolution of three-fourths majority at a special general meeting. Subsequent to this amendment the society went into voluntary liquidation and the question was raised whether members who joined the society prior to the amendment were liable to be placed on the list of contributories for the number of shares required to be taken by each member according to the amendment, and if so the amendment was not *ultra vires* the society as infringing the principle of limited liability.

Held, affirming the judgment of Romer, J., that the point was governed by *Biddulph's case,* (1927) A.C. 76 and that the rule as altered was binding upon the contributories apart from the contract between them and the society.

In re KNAPP. SPRECKLEY *v.* ATTORNEY-GENERAL, (1929) 1 Ch. 341: 98 L.J. Ch. 95.

Will—Gift in favour of a charity—Direction to allow interest on investment to accumulate—If binding on trustees.

After bequests of annuities, etc., a will provided that the residue was bequeathed in favour of a charity but that it was the testator's wish that the interest on his investments may be allowed to accumulate for 21 years, that the interest may be utilised for the purchase of lands and building for the poor of the village and that the total amount at the end of the said 21 years should remain in tact for all time.

Held, the trustees of the charity were not bound by the direction to accumulate, it being a mere wish. But the trustees will bear it in mind in the performance of the trusts.

BALDWIN *v.* ELLIS, (1929) 1 K.B. 273: 98 L.J.K.B. 71.

Election—Nomination paper—Omission of the name of parish for which the candidate was qualified as a Local Government Elector as required by statute—If can be cured.

As under the column "How qualified" in a nomination form, it was only stated "Local Government Elector" and no further details were given as to the parish for which the nominee was a Local Government Elector as required by Rule 4 of the Rural District Councillors Election Order, 1898, the returning officer rejected the nomination paper as invalid. Upon an election petition filed against it,

Held, the omission of a "description" required by a statute or statutory order is not merely an inaccurate description of the person or place, but a failure to comply with the requirements of the particular order in question and as such the defect cannot be cured. It is not a mere technicality.

KNEESHAW *v.* CLAY AND HORSFALL, (1929) 1 K.B. 285.

Income-tax—Change in partnership by one partner walking out—Falling short of profits and gains of trade since the change—Specific cause, meaning of—Calculation of tax.

There occurred a change in a partnership by one partner retiring therefrom and in the first year after the change, there was no fall in profits but in the second and third years (years of assessment) the profits had considerably fallen due to a depression in the market. The Commissioners assessed the firm as usual on the average of the profits for the three years prior to

the assessment year and not on the profits of the year of assessment contending that the question whether there was a fall or not in profits must be decided by a comparison of the profits of the firm before the change in the partnership and those made afterwards and that the comparison must be of the aggregate profits since the change with the aggregate profits of a corresponding period before the change.

Held, by the Court of Appeal.—To fall under R. 11, Sch. D of the Income-tax Act, 1918, it is enough to establish that there has been a falling short of the profits or gains in the year in respect of which relief is being claimed from specific cause and not that the aggregate profits or gains since the change have so fallen short.

BURTON *v.* BOARD, (1929) 1 K.B. 301: 98 L.J.K.B. 165.

Defamation—Libel—Plea of fair comment—If facts on which the comments are based can be proved, when in themselves they are defamatory.

In an action for defamation, the defendant pleaded that the words complained of were comments made in good faith and without malice upon a matter of public interest and sought to give particulars of the facts upon which he was commenting, those facts being in themselves defamatory of the plaintiff. The plaintiff objected to them as being a colourable attempt to set up justification without putting on record a plea of justification in the ordinary sense.

Held, that the defendant is entitled to show and indeed, he must show, what the facts were upon which he commented, that they are facts, that the matter is one of public interest, that the comment is fair and that the comment was made in good faith and without malice. The defendant is entitled to plead that the inferences and comments are fair in the sense that they were made without malice and were such as might reasonably be made on the facts.

WEDDLE, BECK & CO. *v.* HACKETT, (1929) 1 K.B. 321.

Stock Exchange—Purchase and sale of shares and payment of differences—Illegal contract between plaintiffs' clerk and defendant—Stock jobbers ignorant of the same—If disentitled to recover balance due on account.

The defendant entered into a speculative gambling agreement with the plaintiffs' clerk individually by which the clerk

was to buy and sell shares on behalf of the defendant and the defendant was to receive the profit or pay the loss upon the transaction The plaintiffs entered into contracts with the firm of stock jobbers for purchase of shares on behalf of the defendant and subsequently for the sale of the same. The stock jobbers had no intimation that these transactions on behalf of the defendants were not genuine and that the shares would not in due course be taken up on behalf of the defendant. The plaintiffs debited the defendant with the amount paid for the purchase of shares and credited him with the amounts received by them from their sales and brought the action for recovering the balance due from the defendant on account.

Held, that the plaintiffs were acting as brokers on defendant's behalf; that as between the plaintiffs' clerk and the defendant these were gambling transactions, their object being speculation in differences. But as the third parties (stock jobbers) entered into the contracts with the defendants through the plaintiffs as genuine transactions for the sale and purchase of shares, the plaintiffs were entitled to recover.

Swift, J.—"There is no law in this country against betting or wagering generally, and it is not illegal for two people to agree together that they would carry out transactions with an innocent third party which they intend shall really amount to no more than speculative transactions, but which from the point of view of the third party are genuine."

SEABROOK AND SONS, LIMITED *v.* JONES, (1929) 1 K.B. 335: 98 L.J.K.B. 169.

Employer and workman—Labourer—Agricultural Wages (Regulation) Act, 1924—"Employment," meaning of—It means actual working.

An information was preferred by the respondent, an officer under the Agricultural Wages (Regulation) Act, 1924, to the effect that the appellant failed to pay wages at no less than the minimum rate fixed by the Board to his employee. For a week of 50 hours' employment, the employee was to have 30*s.* minimum, but as in a particular week Good Friday happened to be a holiday, the work turned out by the labourer was only 41 hours and wages were paid to him proportionately.

Held—"Employment does not mean actual working at the moment" and the employee must be deemed to have worked even on Good Friday for the purpose of the rule.

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LENG (SIR W.C.) & CO. ("SHEFFIELD TELEGRAPH"), LTD. *v.* SILLITOE, (1929) 1 K.B. 366.

Betting—Ready Money Football Betting Act, 1920—*Publication of coupon of ready money football betting business—Offer of prizes for forecasting winning teams—Paper purchased by some solely and some partly to obtain the coupon and compete—If an offence under the Act.*

During the football season of 1926-27, the appellant company owners and publishers of three leading Dailies, conducted a competition by which the person who most nearly gave the correct results of certain specified football matches was offered a prize. To each newspaper a coupon was attached which had to be filled up and sent to the company. The respondent preferred an information under the Ready Money Football Betting Act, 1920, against the appellant company for unlawfully *publishing* a coupon of a ready money football betting business. It was found as a fact that on the date specified in the charge some persons bought the newspaper solely to obtain the coupons and that some other persons bought it partly to obtain coupons.

Held, that for a conviction under the Act it is enough if the defendant is shown to be carrying on a *ready money football betting* business within the definition of that Act and he is liable even if he should annex it to an existing business. It is not necessary to prove that the substantial object of the newspaper is to sell the coupons either.

ALDRIDGE *v.* WRIGHT, (1929) 1 K.B. 381.

Easement—Right of way—Right not amounting to an easement of necessity—Assignment of servient tenement—If impliedly reserves the easement.

The common owner of two adjacent houses assigned his interests in the houses to *A* and *B*, to *A* in 1901 and to *B* in 1904. *B* got the assignment of the house with all rights, easements, etc., belonging or appertaining to the said premises. *B's* house enjoyed during the common ownership and for some time after *B* got it a right of way through a garden in *A's* house but it did not amount to an easement of necessity. It was contended for *B* that *A* took the assignment impliedly subject to the right of way enjoyed before.

Held, the reservation by the grantor of any easement, other than an easement of necessity over the tenement, must be in express language and cannot be implied. Further such use of

way as has been permitted to *B* has been as a courtesy accorded to a neighbour.

Wheeldon v. *Burrows*, (1879) 12 Ch. D. 31 followed.
Thomas v. *Owen*, (1887) 20 Q.B.D. 225 distinguished.

FAREY *v.* WELCH, (1929) 1 K.B. 388.

Criminal Law—Taking a pigeon under honest belief of ownership—S. 23, Larceny Act, 1861.

Where a person in the honest belief that it was his property takes a pigeon. it does not amount to larceny, nor is it an offence falling under S. 23 of the Larceny Act, as there is no guilty mind necessary to constitute such an offence.

[S. 23, Larceny Act.—"Whosoever shall unlawfully and wilfully....take any house dove or pigeon under such circumstances as shall not amount to larceny at common law, shall, on conviction....pay, over and above the value......any sum not exceeding two pounds."]

FITZGERALD *v* NATIONAL BANK, LIMITED, (1929) 1 K.B. 394.

Will—Legacy—Legatee a creditor of testator of an equal amount—Legacy if in satisfaction of debt.

A testator by his will directed the payment of a legacy of 100*l*. to a creditor to whom he owed 100*l*. bearing interest. There was no provision in the will for the payment of this debt. The interest remained unpaid and was due on the date of the testator's death. The executors under the will paid the legacy and the interest due to the creditor on the debt up to the date of payment. In a suit to recover the debt *qua* debt.

Held, there is a well-settled presumption of law that where a debtor leaves by will to his creditor a legacy of an equal or greater amount than the debt, the legacy when paid must be taken to have been given in satisfaction of the debt and this presumption is not rebutted by the fact that the debt carries interest from day to day.

JAMES FINLAY & CO., LTD. *v.* N. V. KWIK HOO TONG H. M., (1929) 1 K B. 400.

Sale of goods—C. I. F. Contract—Shipment specified in bill of lading as in September—Date of actual shipment later—No fraud but mere inaccuracy in date—Right of buyer to recover damages—Measure of—Sub-contracts by buyer—If to be considered in mitigation.

By a C. I. F. contract, the respondents agreed to buy and the appellants to sell Java sugar to be shipped in September from Java to Bombay as per the bill of lading given to the buyers. No fraud or blame was imputed to the sellers in the matter of the date but it was agreed to be a mere inaccuracy. The purchasers in their turn entered into sub-contracts in India, the sub-contracts containing a clause that "the bill or bills of lading shall be conclusive evidence of the date of shipment". The sugar was in fact shipped only in October and as the market had then fallen the sub-contractees resiled from the contract and the appellants did not seek to enforce acceptance through Court. The appellants received the goods shipped to Bombay and brought this action for damages claiming the difference between the market price and the price under their contract.

Held, in a C.I.F. contract, there is an implied obligation to date the bill of lading correctly and a mistake in that constitutes a distinct breach of contract. The claim in these cases is not merely for breach of contract to deliver on the specified date but also for breach of the undertaking to give a true bill of lading. Therefore the two things to be compared in assessing the damages is not the position of the buyer, so far as money is concerned, if the whole agreement had been performed on the one hand, and the position he would have been in if the whole agreement was not performed. What has to be considered is the buyer's position as regards money if the particular term of the contract had been performed, and he is to be put, so far as money is concerned, in that same position by damages for breach of that term of the contract.

As for the contention that the buyers should have minimised the damages by enforcing their sub-contracts, *held,* if the breach of contract by the original sellers was in doubt, the position might be different. But a seller who has committed a breach of contract cannot compel his buyer who has not broken his contract to minimise the damage by taking an action which may be right in a strict court of conscience but which might injure his commercial reputation by getting a bad name in the trade. The question if *Hall* v. *Pim (Junior) & Co.,* (1928) 33 Com. Cas. 324 can be reconciled with *Williams Bros.* v. *Agius,* (1914) A.C. 510 left open, as in this case the plaintiffs did not claim the difference between the market price and the sub-contract price.

JOTTINGS AND CUTTINGS.

Solicitor's Privilege.—In the case of *Minter* v. *Priest,* the Court of Appeal last week, allowed the appeal from the verdict and judgment at trial before Mr Justice Horridge and a special jury, and entered judgment for the defendant. The plaintiff, a property dealer who wished to sell a house in Mayfair, appointed one, Taylor, to find a purchaser. Taylor found a Mr. Simpson willing to purchase for re-sale, but Simpson could not find the deposit, and his own solicitors would not lend him the money. Simpson's solicitors, however, suggested that the defendant, a solicitor, might assist, and said that if he did they would willingly stand aside and allow the defendant to act as solicitor to carry the matter through. Taylor and Simpson had an interview with the defendant at his office, but he declined to lend the money, and then spoke the words about the plaintiff which were complained of. The case of *More* v. *Weaver* (1928, 140 L.T. Rep. 15) was cited as establishing the general rule that relevant communications between a solicitor actually retained, and the client retaining him, are absolutely privileged. In that case Lord Justice Scrutton referred to the few cases where untrue communications, even though made maliciously, are treated as absolutely privileged, and gave as the reason the fact that "there are certain relations in which it is so important that persons engaged in them should be able to speak freely that the law takes the risk of their abusing the occasion and speaking maliciously as well as untruly." Thus a judge, as was said by Justice Channell in *Bottomley* v *Brougham* (90 L.T. Rep. 111), is not privileged to be malicious, but he is privileged from inquiry whether he is malicious. The same rule was held to apply to communications from a client to a solicitor and from solicitor to client The case of *Browne* v. *Dunn* (6 Rep 71) was also cited, in which Lord Bowen suggested a further privilege, namely, that all that passed between a solicitor and a presumptive client with a view to a retainer was protected if the client in fact retained the solicitor; and *Cromack* v. *Heathcote* (2 Brod. & B. 4) was referred to as showing that the qualification made by Lord Bowen was not needed. In the latter case it was held that privilege attaches, although the solicitor ultimately declines the employment. Two cases (which had not been referred to in the court below), namely, *Jones* v. *Pugh* (1 Phillips 97) and *Carpmael* v. *Powis* (1 Phillips 687), were held to have established that the business on which Simpson and Taylor called on the defendant was properly characterised

as "solicitor's business,'' and as the only evidence given affirmed that the slanders were uttered at a time when professional privilege had by the nature of the business been established, and before it was determined, the whole of the interview was protected, and evidence of what the defendant said could not be admitted.—*L.T.*, 1929, p. 279.

Present Day Tendencies.—How large a part money penalties play in the modern punishment of minor offences is shown by the fact that over half a million persons were mulcted in fines in 1927, and that less than 3 per cent. of those fined went to prison, an ample justification for the practice of allowing time for payment. The view of the authorities on this matter as embodied in the report is as follows: "It increases respect for the law, by securing the real object of imposing a fine, namely, payment; it avoids inflicting upon many petty offenders the unwarranted hardship and degradation of imprisonment; and it not only saves society the cost of their maintenance in prison, but brings in a small contribution towards the expense of coping with minor offences." Another sign of modern conditions is the further increase of 20,000 in motoring offences, which, in the year under review, totalled 183,448, as against 163,301 in 1926 and 150,733 in 1925. Without accurate knowledge of the increase in motor licences it is difficult to pass any criticism on this figure, but there is some likelihood that the rate of increase in offences would on investigation be found to be balanced, if not outweighed by the rate of increase in the cars on the road. It is probable, however, that in the increased use of motor vehicles is to be found some part of the explanation of the increase of nearly 2,000 in the cases of burglary, house and shop breaking, and attempts at the two last, known to the police. The practical difficulty of tracing and punishing the perpetrators of these offences is shown by the fact that in only 38 per cent., or not much more than one-third, of the cases is the perpetrator either charged or detected. A significant commentary on modern tendencies is to be found in the coroners' verdicts of suicide, which total 4,863 as against 3,844 five years ago, and in the increase from 1,461 in 1922 to 2,724 in the cases of attempted suicide. Another indication of the more humanitarian outlook characteristic of these days is found in the very small proportion of cases in which proceedings were taken—754. While cases of drunkenness continue to decline, indecent assault, offences against young girls, and other sexual offences continue, unfortunately, to

increase, the figures for 1927 showing an increase of 153 over 1926 and of 310 over 1925. Cases of bigamy, on the other hand, are fewer.—*L.T.*, 1929, p. 300.

Short Sentences.—The Home Secretary, Sir William Joynson-Hicks, at the annual meeting of the Holloway Discharged Prisoners' Aid Society held on the 16th April, made some interesting remarks on reforms in prison administration, especially with regard to the modern remedial work in prisons and the consequent inadvisability of short sentences of imprisonment. He was convinced that it was impossible to do anything really remedial in building up the character of men in any period of less than three months, and he was certain that the work being carried on at Wakefield where they were collecting prisoners, none of whom had sentences of less than three months, was the right kind of work for young men selected as capable of undergoing it. Hard work in some prisons was now the real thing—not the old treadmill and oakum-picking, but the kind of work the prisoners would do when they left prison. In addition there was physical drill, mental education, and an effort towards moral improvement. He and his advisers felt certain that if they went forward with the remedial side of imprisonment, prisoners must be sent to prison, if sent there at all, for periods long enough to give remedial methods a chance of success.—*L.T.*, 1929, p. 322.

Lord Phillimore.—Apropos the fact that the late Lord Phillimore was the last member of the Bar to be the holder of a patent of precedence, thus entitling him to all the advantages of being a Queen's Counsel without any of the disqualifications which that dignity carried with it at that time, it has been recalled that the only other holder of a patent of precedence in recent times was Judah Philip Benjamin, the great lawyer whose classic treatise on the Sale of Goods would perpetuate his name among members of the Profession if his earlier and somewhat adventurous career were forgotten. Curiously enough Benjamin was a King's Counsel at Lancaster. Was he the last to receive this dignity? Alderson, afterwards Baron Alderson of the Court of Exchequer, tells us in one of his letters that he was offered by Mr. Justice Bayley a silk gown at Lancaster. "I have declined the honour," he wrote, "for the present circuit, but I mean to accept it next time, if offered, and so I told him." Bayley laughed and said, "Well, you are on the road to promotion." Bayley was right, for very shortly afterwards Alderson, while still wearing a stuff gown, was made a judge of the Court of King's Bench, being

transferred some years later to the Exchequer.—*L.T.*, 1929, p. 351.

Statutory Orders.—Just before the House of Commons adjourned last week, Sir John Marriott recurred to the question of Legislation by Departmental Order, and drew a statement from the Attorney-General on the subject. Two methods of control have been suggested: that a Sessional Joint Committee should be set up to scrutinise Statutory Rules and Orders; and that Orders laid on the table of the House should require positive approval before they become operative. But while these methods would result in a more careful examination of the Orders which are issued, the enormous growth of Statutory Orders in recent years is the result of the skeleton legislation to which Parliament has lent itself Sir Thomas Inskip distinguishes between Orders which take from the Courts powers of decision and entrust them to Administrative Tribunals, and those which deal with an infinity of detailed and technical matters which Parliament cannot be expected to wade through. Lawyers are familiar with Orders of the latter sort in Rules of Court and Rules under the Land Registration Act Numerous matters in connection with the Law of Property Act are also dealt with by Rules. These Rules, however, in general come not from a Government Department, but from a Rule Committee representative of the various interests affected, and perhaps a similar check might be placed on industrial and other regulations.—*L.J.*, 1929, p. 247.

Administrative Tribunals —There is more serious objection to the transfer to Government Departments of the judicial powers which properly belong to the Courts. The Attorney-General says that this is not a departure for which the present Government is responsible. No doubt he is right, but in suggesting that it dates from the time of the Coalition Government he hardly goes far enough back. England does not love Coalitions, but this political maxim was born long before the Executive had begun to encroach on judicial functions. It was just before the war that Lord Haldane laid down, in *Arlidge's Case* (1915, A. C. 120), the principle which must guide an Administrative Tribunal. "In modern times," he said, "it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are

administrative and not in the ordinary sense judicial." And in the exercise of those semi-judicial duties, the Department is bound to act in good faith and to listen fairly to both sides; but it is not bound to follow ordinary judicial procedure. That judgment is the charter of administrative tribunals, but it is for Parliamentary vigilance to see that only matters really appropriate shall go to such tribunals. The Attorney-General, without committing the Government, suggests that it is time for some inquiry to see how far the mischief—"if it be a mischief"—has extended, and to see what steps can be taken to check it. But the check, if it comes, will be due to independent members like Sir John Marriott, and not to the halting admissions of Law Officers.—*L.J.*, 1929, p. 248.

Women Police.—The employment of Women Police is held to have justified itself and a substantial increase in their numbers is recommended, particularly in cities for patrol work in uniform. It is suggested, and there will, we think, be general agreement with the recommendation, that a sufficient number of qualified and specially trained women should be made available to take statements from all young girls and children in sexual cases The practice by which such statements are taken by a male officer in the presence of a "chaperon" is wholeheartedly lemned.

rom the point of view of the person making the statement, a mixed ce would seem to be the worst possible arrangement and the most rassing which could be devised for the narration of the details of sexual offence.

—*L.J.*, 1929, p 269.

Women Barristers and Publicity.—The newspaper maxim that "Women are news," has of late been exemplified in the case of women barristers, whose every brief, every movement, and every forensic article of apparel irresistibly attracts the attention of the journalist. It is not only to the "first woman" series that their observations apply. Everyone knew that the first woman called to the Bar, the first woman to hold a brief, the first woman briefed in a criminal case, a civil case, a murder trial, a breach of promise action—these would inevitably receive a good press and their names be written among the immortals. But now the journalist have passed on to make notes concerning the pretty ones; how they "trip into court" and out again; whether they appear shy or imperturbable; and the male barrister, however worthy of notice, becomes interesting only by reason of his proximity to one of them.

The latest topic is the difficult and highly controversial subject of women's forensic neckwear. It is one which was much debated and discussed by the profession when women barristers began. And now the first woman to wear the high-peaked collar of the male has been noted with appropriate comment by an eager press. If it is generally adopted, sex in wig and gown would, as in the Forensic Fable, be entirely unidentifiable.—*L.J.*, 1929, p. 275.

Sunday and the Law.—The fact that the Sunday Observance Acts are generally disregarded does not, of course, mean that they can be treated as having been repealed. As a matter of fact, there are a substantial number of prosecutions for breaches of these Acts every year—according to the Criminal Statistics there were 29,623 cases in 1927. These figures are startling, especially when it is noted that the average from 1900-1904 was only 5,208, and that from 1915-1919, 9,061; but the explanation appears to be that the Acts are enforced with extreme rigour in a very few places. Of the 1927 total of 29,623 charges of Sunday trading, no less than 19,720 were brought in the County Borough of Kingston-upon-Hull! The County Borough of Grimsby comes next with 3,684 cases, Wales accounts for 3,580, the West Riding for 1,246, and Lin-coln (Parts of Lindsey) for 620. So that these five loca... account for more than 28,700 of the total of 29,623. Th... that a particular law is enforced so unequally is obviously... satisfactory, and it is high time that these statutes were rec... sidered by Parliament. So long as they remain on the Statute Book, the Courts must take judicial notice of them as occasion arises, and two such occasions have recently arisen. In *Jones* v. *Smith* (*Times*, March 16), Mr. Justice Clauson refused a motion for an injunction to restrain a landlord from refusing to permit boxing contests on Sundays in a hall which had been let for that express purpose, the learned Judge said that since a charge was made for admittance the provisions of the Act of 1771 would be infringed, and that the Courts could not grant an injunction which would have the effect of enabling an illegal act to be done. In the other case, a magistrate at Bow Street held that the refusal of a licence to trade in the street on Sundays was justified under the Act of 1679.—*L.J.*, 1929, p. 283.

The Lord Chancellor's Religion.—That is the common belief which has hitherto been accepted and acted upon when Lord

Chancellors are made. But it is difficult to find in the existing law any reason for the discrimination. He who wrote the note on page 56 of the seventh volume of *Halsbury's Laws of England*, after summarising the effect of the Statutes, observes that, whatever the effect of those provisions may be, it would clearly be held unconstitutional by Parliament for any person other than a Protestant to be appointed.

Lord Coleridge, when Attorney-General, was of a different opinion; and in reply to a question by Sir Colman O'Loghlen in the House of Commons on May 6, 1872, delivered a reasoned opinion that the effect of 34 and 35 Vict., c. 48 (the Promissory Oaths Act of 1871) was, when taken in conjunction with the earlier Acts, to remove every restriction against Roman Catholics. "The 21 and 22 Vict.," said he, "substituted one oath for the three oaths of objuration, allegiance and supremacy, which up to that time had existed. The substituted oath was just as exclusive as regarded the Roman Catholics as any of its predecessors. The 31 and 32 Vict., substituted a further oath, but that the Roman Catholics could take, and by the ninth section the Lord Chancellor was specially referred to as a person who could take the oath....if a Roman Catholic could take the new oath he could become the Lord Chancellor."—*L.J.*, 1929, p. 292.

The Uneasy Statutes.—Apparently, the real difficulty, whensoever a great lawyer, qualified by every merit save his religion for the Lord Chancellorship, comes to the point where he must be deliberately rejected or accepted, will be the constitutional feeling of the House of Commons. It is amazing how a question of this kind will suddenly and unexpectedly set the Parliamentary spirit in a flame.

But enough of this Popery. Yet I must mention the manner in which Sir John Coleridge, the Attorney-General, prefaced his famous reply to Sir Colman O'Loghlen in the House.

He recalled the story of Lord Coke, who, on being asked by James I a question of law, enquired: "Is it Common Law or Statute Law? Because," said he, "if it's Common Law I can answer it in bed; but if it is Statute Law I must get up and examine the Statutes." There is not a practitioner amongst us who has not, at times, experienced that feeling of unrest at the mention of a Statute.—*L.J.*, 1929, p. 292.

An Expression of Regret.—I heard the other day in Hall a story, probably old and possibly not authentic, touching the

rule that a legal text-book may not be cited in Court until the embargo is removed by the author's death. Counsel was quoting a passage from Scrutton on Charterparties, in a case which was being heard by the learned author.

Scrutton L.J.: You are aware that the author of that book is still alive?

Counsel: I'm sorry, my lord.—*L.J.*, 1929, p. 292.

When the King Makes His Will.—A King can make a last will and testament disposing of his real and personal estate; but his wills are not as our wills. In the Parliament Rolls of the sixteenth year of Richard II it is recorded that "the Bishops, Lords and Commons asserted in full Parliament that the King, his heirs and successors might lawfully make their testaments". The estate of Henry IV was in such dubious plight that, although he had made a will and appointed executors, they refused to act because they were afraid the assets would be insufficient; and Henry V had to step in to save the face of sovereignty and to avoid the indignity of a sale.

Henry VIII made a will disposing of no less an asset than his Crown; and for this he had the express sanction of 28 Hen. VIII, c. 7, which declared that he might limit the Crown by his last will made in writing and signed under his hand, lest the realm might be "encumbered with such a person that would covet to aspire to the same, whom the subjects of this realm shall not find in their hearts to love, dread and obediently serve as their Sovereign lord." The will was duly made and deposited in the registry of the Prerogative Court of Canterbury.—*L.J.*, 1929, p. 292.

The Age of Marriage Bill.—Lord Buckmaster's Bill to make void marriages between persons either of whom is under the age of sixteen has emerged from the Select Committee of the House of Lords to which it was referred, unimpaired as to its essential point, but with certain additions which, in our view, remove the doubts which led several eminent lawyers to demand, when the Bill was first introduced, that it should receive further consideration before being passed into law. It will be remembered that as originally framed, the Bill provided simply that a marriage between persons either of whom was under the age of sixteen should be void. The Bill received a unanimous second reading in the House of Lords, but when the Committee stage was reached, a number of Peers, including Lord Hanworth, Arch-

bishop Davidson, and Lord Darling, expressed grave fears as to the effect of the proposed change, and carried a motion for the reference of the Bill to a Select Committee. The Committee has been commendably prompt in dealing with the matter—a Select Committee of the House of Lords is an ideal body for considering such a question as this—and has now put forward a remodelled Bill which will, no doubt, pass without difficulty or delay into law. The controversy in the House was chiefly as to whether such marriages should be void or voidable; and after hearing evidence from those best qualified to give it, the Committee take the view—which we said at the time (*ante* p. 194) was our own view, that they should be not merely voidable, but void So that Lord Buckmaster's wish on this point prevails, a result which we are inclined to think would not have been attained had the House of Lords dealt with the Bill in Committee in March.—*L J.*, 1929, p. 300.

The Safeguards.—The additions made to the Bill by the Select Committee aim at safeguarding parties to marriages which it renders void from consequences which it would not be just should follow. Marriages contracted before the Act are not affected; and it is to be a difference to a charge under S. 5 (1) of the Criminal Law Amendment Act of 1885, or for an indecent assault, that the person charged had gone through a form of marriage with the girl, and had reasonable cause to believe that she was over sixteen. Clause 2 is important in the interests of the "wife"; it provides that where parties to a marriage which is rendered void by the Bill have lived together and have afterwards separated, she may make appliaction for an affiliation order in respect of any child born of the intercourse at any time within twelve months after the separation, without proof that the father has paid money for the maintenance of the child or children. It will be seen that there is nothing in these additions which in any way weaken the Bill; and we imagine that Lord Buckmaster will agree that its chances of passing through both Houses of Parliament during the few weeks which remain of the present Session have been immeasurably increased by the fact that it has been calmly and dispassionately considered by a Committee which has heard evidence and has come to a reasoned conclusion upon its merits.—*L.J.*, 1929, p. 300.

The Retirement of Lord Shaw.—Lord Shaw has himself in *The Other Bundle*, summarised his public career: "In 1892 entered Parliament;. in 1894-1895 was Solicitor-General for

Scotland; then ten years of Opposition; then 1905-1909 Lord Advocate; then, with infinite regret, I left the House of Commons, being created a Lord of Appeal. Then in the House of Lords for eighteen years. That is to say, on duty in the Palace of Westminster for thirty-five swiftly flowing years." Now the eighteen years has been increased to twenty—a length of service, we believe, rarely equalled in the House of Lords—and Lord Shaw retires at the age of eighty-two.

We have just referred to one of Lord Shaw's books, and there is another, the *Letters to Isabel*. Between them we get a revelation such as is not often afforded during a man's life, and the whole is of great interest. We are told of the early drudgery, in a slicitor's office; the abandonment of the office for Edinburgh University, with hardships of another kind—"I rejoice that the life of the poor student is now infinitely happier, infinitely more human. I love the poor student. He is of the earth's best"; the Hamilton Fellowship of 300*l.* which came his way and might have diverted him to philosophy, with literature as a strong rival. But it was to be the law, after all, though this time at the Bar, and in 1875 Thomas Shaw "entered the Edinburgh Parliament House,'' which we take it, is the same as being called to the Bar here.

Next there was the work of the rising advocate with the difficulty when Parliamentary life began of combining law in Scotland with politics in London. "To fit in these two ends of existence, the life and the living, when between them there ran a railway track of 400 miles, needed some engineering and not a little loss of sleep." In the session before he became Lord Advocate, Lord Shaw says he travelled on that track, mostly by night, a distance equal to the circumference of the earth. It was a heavy price to pay for the double success of the Bar and the House of Commons. And success in the House started in a curious way. In these days we are still trying to get Crown procedure put on a right basis, and it was just this matter that first brought Lord Shaw to the front. There was a Home Rule Bill, and in some way a question arose about the necessity of a petition of right before you could sue the Crown. Gladstone wanted the point explained, but there was difficulty because Rigby tried and was too heavy—probably he would be. Then Shaw, under a sudden inspiration, caught the Speaker's eye, and told the House of the simple Scottish plan of doing without a petition of right altogether, and just suing the Government

That did not do much for Crown procedure, but it appears to have started Shaw on the public career which placed him at length in the House of Lords.

And to that House he attained twenty years ago. We are not going to trace the judicial course of those years. They included the war years when, rightly or wrongly, liberty was curtailed. We always remember with gratitude Lord Shaw's great judgment in *Halliday's Case* (1917, A.C 260) in favour of the inviolability of Magna Carta. He was in a minority of one—"Among the faithless, faithful only he"—and if we must assume it was not law—for Parliament since John Austin's day has been omnipotent and can override even our fundamental statute with Emergency Laws—it was a noble gesture. But Lord Shaw has been effective enough on the Judicial Committee, which, he has said, "wields a jurisdiction over one quarter of the population of the globe." And the story of the Reign of Law he carried over the sea when he visited the American and Canadian Bar Associations and delivered the Addresses which are preserved in *The Law of the Kinsmen.*

Lord Shaw has had a distinguished career; it has been a career marked by high ideals—his advocacy of the League of Nations is one instance of this, his advocacy of pure literature is another; and he carries into his retirement the good wishes of the profession.—*L.J.*, 1929, p. 307.

The Abstinence of Eve.—There is a treat in store for someone who would show the sights of London to a fresh and intelligent person who has never seen them before. Eve, J., with unblushing and even boastful candour, has confessed that he does not like London, and has never been to the Waxworks. Not only so. At the dinner of the London Society he produced a list of Things He Had Not Seen; a list so long that his breathless listeners, aware from former confessions that he had no ear for music, wondered if he had an eye for any of the marvels of his native city. The interior of the National Gallery, of the Tate, of the Portrait Gallery he has never seen; not yet, despite seventy years of opportunity, has he beheld the mummies and other exciting contents of the British Museum; never has he crossed the threshold of the Mint, or the Bank of England, Woolworth's, Selfridge's or Harrod's; man and boy, he has never pressed his eager face against the bars which protect the Crown Jewels; and he has not, up to date, been inside the Bloody Tower or any other of the Towers of London.

I think he has been to the Zoo; I have seen him in the Law Courts; and he has never, so far as I am aware, pleaded judicial ignorance of the nature and locality of any of the Sights of London.—*L.J.*, 1929, p. 310.

Lord Haldane as Labour Chancellor.—In the present condition of political parties a Labour Government has not the same variety of legal talent of which to avail itself as a Conservative or Liberal Government, but, no doubt, Mr. Ramsay MacDonald will surmount that difficulty. In his former Premiership, he was able to obtain the co-operation of Lord Haldane as Lord Chancellor, and it is unfortunate that death has intervened to prevent a recurrence of this arrangement. But Lord Haldane has told us in his Autobiography that he joined the Labour Government on special terms, both as to remuneration and work. Of the 10,000*l.* a year to which he was entitled as Lord Chancellor, he returned 4,000*l.* to the Treasury, retaining 6,000*l.* a year to meet the unavoidable expenses of the position and his own requirements. Needless to say, he had not indulged in the pleasure of an expensive family, and family or no, this self-denial is, we imagine, not likely to be repeated. Then he thought it incumbent on himself to make a change which he had advocated in the Machinery of Government Report. He dropped the daily judicial sittings, and allotted time instead to the superintendence of Justice and the reorganisation of the magistracy. In addition, of course, he had to attend to Government Bills, act as Constitutional Adviser to the Cabinet, and preside in the House of Lords, while he was also Chairman of the Committee of Imperial Defence. It was a sufficiently large programme, even without the judicial sittings. But the brief duration of Mr. MacDonald's first Government hardly allowed a new precedent to be established for the Lord Chancellorship. It will be interesting to see if the experiment is repeated, though the withdrawal of the Lord Chancellor from judicial duties would be an unwelcome break with tradition.—*L.J.*, 1929, p. 409.

Prof. Holdsworth's Knighthood.—No one who is acquainted with Prof. Holdsworth's "History of English Law" will be surprised that he appears in the list of Birthday Honours as the recipient of a Knighthood; the surprise will be that it is inserted in the list of Honours for India. The explanation is that Prof. Holdsworth was a member of the Committee—the others being Sir Harcourt Butler, chairman, and the Hon. Sid-

ney Peel—which recently inquired into and reported on the relationship between the Paramount Power and the Indian States. Appointed in 1927, the Committee visited India, and on its return last autumn had the advantage of hearing Sir Leslie Scott on behalf of a large group of States, and of receiving the opinion of other eminent counsel on the legal and constitutional aspects of the subject of inquiry. The Report, which was issued in April, will doubtless have an important effect in renewing the confidence of the Indian Princes in Great Britain as the Paramount Power, and from the official point of view, it is intelligible that this has been taken as the occasion for bestowing a well-merited honour on Prof. Holdsworth. But while we do not grudge his name to the India List, we more willingly see in the honour a recognition of the great services he has rendered to the study of English Law.—*L.J.*, 1929, p. 410.

Wives and Income-tax.—The question of the treatment of the incomes of husband and wife as a single income for the purposes of income-tax is being again ventilated in the Press. It is not a matter of separate assessment, for that method has been available ever since 1914 for those who elect to avail themselves of it. But separate assessment does not meet the real objections. These are mainly, that husband and wife do not get each a personal allowance of 135*l.*, but a joint allowance of only 225*l.*; and that only one sum of 225*l.* is taxable at half the standard rate, whereas each income, if treated separately, would have the benefit. The Income-tax Commission of 1919 heard a great deal of evidence on the subject, and came to the conclusion that the system of aggregation of the incomes of wife and husband should continue to be the rule. They regarded the objections to it as more vocal than real, and there was the very solid argument that a change in the system would, according to the Inland Revenue figures, involve a loss of 20 millions, increasing possibly to 45 millions in consequence of the avoidance of tax by the transfer of income from the husband to wife. The married state has certain mitigations in the children allowances, but these do not wholly meet the objections to the present system, nor is the loss of revenue a final argument, if the system is essentially unjust.—*L.J.*, 1929, p. 411.

Mr. MacDonald's Legal Appointments.—Last week, in referring to the filling of the legal offices in the new Government, we abstained from prophecy, and were content to suggest that the Prime Minister would be able to surmount the difficulty caused by the failure of the Labour Party so far to attract within its fold any considerable number of prominent lawyers. Of the three posts in which the profession is specially interested, two have been filled in the manner generally anticipated. Lord Justice Sankey becomes Lord Chancellor, and Mr. J. B. Melville, K. C., becomes Solicitor-General. But the Attorney-Generalship has proved a surprise. The attraction of the Labour fold, which was not strong enough before the election to prevent Mr. W. A. Jowitt, K. C., from contesting Preston as a Liberal, has proved strong enough after the election to win him from Liberal to Labour. This has enabled Mr. MacDonald to offer him the post without going back on the statement, said to have been made to the Executive of his Party, that he did not intend to make any appointments from outside its ranks. Sir Henry Slesser, who was Solicitor-General in the last Labour Government, succeeds Sir John Sankey as a Lord Justice in lieu of becoming a Law Officer again.—*L.J.*, 1929, p. 427.

The New Lord Chancellor.—Of these appointments, the promotion of Sir John Sankey to the Woolsack is, in interest as well as in rank, the most important, and the Labour Party are to be congratulated on gaining such a recruit. That it can be treated as a political appointment in the ordinary sense we are not sure. Lord Haldane, the first Labour Chancellor, had already been turning to Labour, mainly because he found in Liberalism small encouragement for his ideals in education, and he was ready for the overtures Mr. MacDonald made him at the end of 1923. That was the significant but intelligible conversion of a strong politician. Of Sir John Sankey it would be inappropriate to speak in terms of party politics. If he has had political leanings, they have not been made public, and they are hardly to be found in his Report as Chairman of the Coal Commission in 1919, and his recommendation of the acquisition of mining royalties by the State. It is known that he sympathised with Lord Haldane's views on education, and the lecture which he gave at King's College in March of last year on "The Principles and Practice of the Law To-day" (reported in the *Solicitors' Journal*, March 17 and 24, 1928) shows that he has interested himself in recent developments of Administra-

tive Law "It would be strange," he said, "if we had escaped the frying-pan of the Prerogative to fall into the fire of a Minister's Regulations" It will probably be found that Sir John Sankey has very definite views on this matter, and it may be anticipated that he will attempt to regularise administrative justice in the interests of the subject. The chances, too, of proceeding with the reform of Crown procedure may be improved. But politically, Sir John Sankey has a clean slate, and he may be expected to take up impartially the important duties of his office. His appointment adds distinction to the Labour Government, and his occupation of the Chancellorship will be watched with interest.—*L.J.*, 1929, p 427.

Slesser, L.J.—Sir Henry Slesser, who takes Lord Justice Sankey's place in the Court of Appeal, is personally popular with the profession, but has been regarded rather as an intellectual with interests in religion and philosophy than as an outstanding figure at the Bar When Mr. Ramsay MacDonald first took office in 1924, Sir Henry Slesser was a junior and received silk *ad hoc* on appointment as Solicitor-General. His promotion to be Attorney-General this time would not have been unexpected, but we doubt if his best friend would claim that [illegible]osition entitled him to expect promotion direct to the Court [illegible]ppeal. That is a very high honour, implying as it does the [illegible]ng over of the existing High Court Bench, and the appoint[illegible]t at once challenges comparison with that of so great a lawyer as the late Lord Moulton Outside the rather restricted sphere of Trade Union cases, Sir Henry Slesser has never enjoyed a practice comparable with those of many other front rank leaders, and his promotion has, frankly, caused some surprise. It must not be forgotten that Lord Justiceships are in the gift of the Prime Minister, not of the Lord Chancellor, and this may account for the vacancy not being filled from the High Court Bench, with the subsequent offer of a puisne judgeship to Sir Henry Slesser. It is conceivable that the new Lord Chancellor might have been unwilling to make his first appointment to the Bench so plainly a political one. We trust that the Prime Minister will remember that neither the public nor the Bar likes the high judicial offices to be merely places to be filled according to political convenience. There were, it is thought, difficulties also in promoting a High Court Judge, in that a resolution of the two Houses would have been necessary before a vacancy in the King's Bench Division could be filled, and that

might not have been easily obtained in the present state of the lists. It may be admitted that many judicial appointments which have been criticised at the time have proved to be justified by the ability and judicial qualities of the holder, and we hope that this will be one of them.—*L J.*, 1929, p. 428.

Sacrifice.—Even from the point of view of finance, however, it is very doubtful whether any member of the Bar with a High Court practice would lose by accepting the office of Attorney-General. The highest income earned by the most fashionable silk during the past year did not greatly exceed 20,000*l.*; and the statement that 40,000*l.* was earned has no foundation in fact.

Apart from the income-tax officials, who disclose no secrets, the clerks are the best-informed people on the subject of a barrister's income; and when a thousand guinea brief is delivered in the Temple or in Lincoln's Inn, everyone knows about it next day. Four "thousand-guinea" briefs per term in the whole Temple is a high average for the past four years; and briefs of higher denomination are still more rare.

In any event, the theory of self-sacrifice, in the absence of sufficient motive, by barristers or laymen, is unacceptable.—*L.J.*, p. 438.

Sovereignty and the Privy Council.—My reference to Barra O'Briain's opinion of the Judicial Committee of the P[illegible] Council, as expressed in his interesting book "The Irish Constitution," contained a misquotation; and I am very greatly obliged to him for calling my attention to it. He wrote, with regard to Australia, not that all questions, but that all constitutional questions, had been withdrawn from the Judicial Committee.

That the Judicial Committee is open to grave criticisms is an assertion which will not generally be disputed. But I think that its defects are such as could be remedied by a reform in its constitution and by limiting its jurisdiction so far as the self-governing Dominions are concerned, to questions affecting two or more of them. The idea that the appeal to the Privy Council diminishes the sovereignty of the Dominions is largely fanciful. Every member of the League of Nations is pledged to a similar restraint; and the Judicial Committee, as a court of appeal from the British Commonwealth of Nations, has provided a notable precedent for world courts and international

tribunals. The rigid Austinian theory of sovereignty is in practice as dead as mutton in the modern world.—*L.J.*, 1929, p. 438.

Judicial Precedence: The President of the Probate Division.—My thanks are due to the reader who reminded me, with reference to my observations on the order of legal precedence in 1885 and 1929, that I had omitted to give his proper place to the President of the P. D. and A. Division. His position, dubious before, was clearly established by the Supreme Court of Judicature (Consolidation) Act, 1925, sec 16 (2).

The order of judicial precedence in the Supreme Court contained in S 16, which supersedes the order as laid down in the Judicature Acts of 1873 and 1875, is now as follows: The Lord Chief Justice and the Master of the Rolls shall, when sitting and acting in the Court of Appeal, rank in that order. A person who has held the office of Lord Chancellor or a Lord of Appeal in Ordinary shall, when so sitting and acting, rank according to his precedence as a peer. The President of the Probate Division shall have rank and precedence next after the Master of the Rolls. The Lords Justices of Appeal, if not entitled to precedence as peers or privy councillors, shall rank after the *ex-officio* judges and according to the priority of the dates of their appointment to the Court of Appeal. The judges of the High Court who are not also judges of the Court of Appeal shall rank next after the judges of the Court of Appeal according to the order of their judicial seniority.—*L.J.*, 1929, p. 438.

The M.R.'s Memoirs—In Lord Hanworth's memoir of Chief Baron Pollock (John Murray) there is a wealth of interesting fact and anecdote relating not only to the chief ornament of the Pollock family, but his illustrious political and legal contemporaries of the eighteenth century.

The Master of the Rolls repeats from Lord Alverstone's Recollections of Bar and Bench one very human story of the Lord Chief Baron. When on circuit at York he was called at 5 a.m. to read a voluminous brief; but he picked up the "Heart of Midlothian" and became so absorbed in it that he never touched the papers until breakfast time. The Court sat at nine, and Pollock went into court in total ignorance of the contents of the brief and of the two or three hundred letters in the correspondence.

He was equal to the occasion. Said he to the jury: "I could not better present the facts of the case to you than by

using the language of the parties themselves, and I shall therefore read to you the correspondence in chronological order. And he did.

Abbott, C.J., growing weary, asked if it was necessary to read all the correspondence? "Absolutely, my lord," replied Pollock, "for I never read it before."—*L.J.*, 1929, p. 438.

Thackeray and Chief Baron Pollock.—The Master of the Rolls sets out Thackeray's acceptance of an invitation to dine with the Lord Chief Baron on "ye last day of May":—

By Fate's benevolent award, should I attain the day
I'll drink a bumper with my Lord before the last of May
That I may reach that happy time most fervently I pray,
For ducks and peas are in their prime upon the last of May
At thirty boards 'twixt this and then my knife and fork will play,
But better wine and better men I shall not meet in May
And though, good host who bid me dine, your honest beard is grey,
And, like this powdered head of mine, has seen its last of May,
Yet, with a heart that's frank and kind, a boyish spirit gay,
You've spring perennial in your mind and round you make a May

Compare the spirit of this acceptance with that of Bowen, L.J., when he asked for a lift to Lord Selborne's melancholy spree, as set out in our last week's issue.—*L.J.*, 1929, p. 438.

Our Three Prime Ministers.—It is curious, having regard to the number and the high political gifts of barrister M.P.s, that so few of them have become Prime Ministers. The probable cause is that the best of them preferred the stately permanence of the higher judicial posts or the greater temporary advantages of the Lord Chancellorship. Many there are who consider that Lord Hailsham might have become Prime Minister if he had followed his star in the House of Commons; and there is a distinct possibility that Sir William Jowitt may in time, if he pursues that object with undeviating ambition, become Prime Minister in a Socialist administration.

At present, however, the Bar can boast of only three Prime Ministers. The Hon. William Pitt, junior barrister of Lincoln's Inn and the Western Circuit, was the first; the Hon. Spencer Perceval, Solicitor-General to the Queen, Solicitor-General, Attorney-General and Chancellor of the Exchequer, was the second; and Mr. Asquith, K.C., of the North-Eastern Circuit, Home Secretary and Chancellor of the Exchequer, afterwards Lord Oxford, was the third and the last.—*L.J.*, 1929, p. 454.

The Life of a Law Officer.—Law Officers, as such, do not last long, and their average span of life does not amount to more than two or three years.

The shortest on record was that of Sir John Jervis, who was Solicitor-General for three days. When Lord John Russell formed his first administration, in 1846, Sir Thomas Wilde resumed his old position as Attorney-General with Sir John Jervis as his colleague. His appointment was dated July 4. Two days later Tindal, C.J., died; Wilde succeeded him, and Jervis became A.G.

Mr. Theobald Mathew, in commenting on this appointment, drew attention to the effect of luck on legal destinies. "Had Tindal, C.J., died three days earlier, or Sir Robert Peel's Government lasted three days longer, the Chief Justiceship would have fallen to Sir Frederick Thesiger. As it was, that learned lawyer had to linger at the Bar for nearly twelve years before he became Lord Chancellor in the Government of Lord Derby. His first Chancellorship, in 1858, lasted for a few months only, and his second (1866-1868) was abruptly terminated before it was two years old by his dismissal at the hands of the new Premier, Mr. Disraeli, and the promotion of a younger rival, Lord Cairns . . . . if he had succeeded Tindal, C J., in 1846, he might have been a Chief Justice for thirty years and more."—*L J.*, 1929, p. 454.

CONTEMPORARY LEGAL LITERATURE

Once dreaded as unsafe, the aeroplane has now been improved and popularised and before long if, as Mr. Eubank suggests, an airplane and landplane should be combined in one, it may wholly displace the motor of to-day and it is therefore necessary that the question of the right of the aeronaut to fly in the airspace over another's land should be definitely decided. The difficulty arises from the maxim *"Cujus est solum ejust est usque ad colum"* and if, as some would have it, it is only a nice theory passed down from mediæval times when there was no occasion to apply it to its full extent, the problem may be easy of solution. But seeing the varying circumstances to which the maxim has been applied, it may be difficult to deny to the owner of land his proprietary right to the airspace above and in that event the difficulty will face the aeronaut how he can trespass on another's property. In two articles in the *American Law Review* by Professor Hiran L. Jome of Denison University and Mr. John Eubank of the New York Bar, attempts are made

to solve this difficulty. The solution of this problem has to be arrived at by a delicate balancing of the rights of the individual and of society. The individual must be protected, but his bundle of rights ought not to be so enlarged as to jeopardise the development of the industry. Broadly speaking, there are two views on the question. (*i*) that a landowner has exclusive proprietary right in all the airspace over his head, and (*ii*) that the landowner has no property whatever in the airspace. The exponents of the first view rely on the maxim The advancers of the second argue variously—(*i*) Balloonists, smoke, sounds, carrier pigeons, etc., have for a long time passed and repassed over private property and no owner has ever recovered damages for it without proof of damage. (*ii*) It is an obsolete maxim which can be disregarded in the interests of industry. (*iii*) If the maxim is at all to be applied, it must be limited to the zone of effective possession, that is only so far upward as the necessities and the protection of the landowner require. (*iv*) The ownership in the airspace has been lost by failure to use the airspace. (*v*) This is analogous to the easement or right of the public to pass over water of a river, the bed of which is the private property of another. (*vi*) After all it is a "*damnum absque injuria*" (damage without injury) and "*di minimis non curat lex*" (a triviality which the law will not take note of). (*vii*) The superincumbent airspace is a newly discovered territory and therefore common to all. But this school does not say at what height this territory begins. Mr. Eubank points out that the opposing advocates in effect admit the owner ship of the landowner but would limit it to those uses which are appurtenant to the land and necessary to the full enjoyment thereof. Professor Jome points out that *Coelum* in the maxim was understood by the Latin writers, as also Blackstone and Coke only as referring to the space which began a short distance above the surface of the earth. In that view the landowner could never have possessed any right over the space traversed by the airplane. Mr. Eubank also refers to passages from Justinian's Institutes and Queen Elizabeth's which say that the air like the sea is *ex jurae naturae* common to all. During the world war national governments asserted their sovereignty in the airspace over their territory and the first International Air Navigation Convention held in Europe in October, 1919, accorded to all Governments such sovereignty with a right of innocent passage to subjects of other Sovereign States. Such right of passage is only temporary and can be revoked when occasion demands. Both the writers refer to several Acts of the

legislatures in America, Great Britain, etc., which have recognised the proprietary right of the landowner but made it subject to the right of reasonable flight of aeroplanes. Professor Jome says that "these laws regardless of the real meaning of the common law maxim have quite unnecessarily created a property right in the airspace, the justification for the limitation of which must be proved". But Mr. Eubank questions their legality in so far as they legalise flights and deprive the owner of the land of his right to compensation for the loss of his proprietary right in the airspace.

Referring to the decision of the Court of Appeal in *Weld v. Petre*,[1] *The Law Quarterly Review* (April, 1929) says that it emphasises the survival of the old doctrine "Once a mortgage always a mortgage" In *London and Midland Bank v. Mitchell*[2] and *In re Stucley*[3] it was held that the statutes of limitation did not apply to proceedings to foreclose mortgages of pure personalty and in the case under review, that was applied to proceedings for redemption. In the case under review the mortgagor was permitted to redeem eighteen years after the last acknowledgment. The note points out that although redemption was allowed after 18 years, the majority of the Court (Lawrence, L J, and Master of the Rolls) was not prepared to hold that mere delay without more was insufficient to constitute a bar to redemption, but as the note later points out, Lawrence, L.J., quotes verbatim from *Lindsay Petroleum Co. v. Hurd*[4] and *Erlanger v. New Sombrero Phosphate Co.*[5] and both these passages refer to acts or changes occurring during the interval which might prejudicially affect either party. Sankey, L.J., applies to the case under review the test of change in the position of the parties so as to make it impossible to restore them to their original position, but earlier lays it down that "unreasonable delay may bar the mortgagor's right to redeem."

At the present day it has become a practical question to ascertain the nature and incidents of a marriage of a Hindu or Muhammadan with an English girl in England. In a contribution to the *Journal of Comparative Legislation and International Law*, Mr. Les De Gruyther, K.C., has dealt with the question in three aspects: (*i*) The validity of the marriage, (*ii*) the dissolution of the marriage, and (*iii*) the rights of inheritance consequent on the marriage.

1. (1929) 1 Ch. 33 2 (1899) 2 Ch. 161. 3. (1906) 1 Ch. 67.
4. (1874) L.R. 5 P.C. 221 at 239. 5. (1878) 3 A.C. 1218 at 1279.

To constitute a valid marriage, two conditions are to be satisfied: (*i*) The parties must have the capacity to marry each other, and (*ii*) the requisite ceremonies should be gone through, the nature of the ceremonies being governed by the law of the place of the marriage. The Hindu marriage being a sacrament, the Hindu Law will not permit such a marriage and therefore the marriage of a Hindu with an Englishwoman will be invalid. A Hindu can renounce his religion and then marry an Englishwoman validly but then the precise matrimonial relations resulting from such a marriage and also the mode in which his estate will be distributed on his death intestate would be left in doubt The marriage under Muhammadan Law being a civil contract, the marriage of a Muhammadan with an English girl will be valid. There is a prohibition in that law against marrying an idolatrous woman but not an English girl who belongs to the "scriptural sects".

The matrimonial status is governed by the law of the domicil of the parties. The wife on marriage enters the domicil of the husband, and the principles governing dissolution will be determined by the law of India. Among Hindus there can be no divorce but the Muhammadan can divorce at will subject only to the payment of the dower to the wife.

In the case of a Hindu, the marriage itself being invalid, neither the wife nor the children, if any, of such a marriage could have any rights of inheritance. On the death of the Muhammadan husband, the distribution of his estate would be in accordance with the mode of distribution directed by the Muhammadan Law. If the question should arise in England with regard to the property in England, the personal property of the intestate will devolve on those entitled to take by the law of the actual domicil of the intestate at the time of his death. Mr. De Gruyther leaves open the question of succession to realty.

The next question is, if the wife can be granted any relief in England under the Matrimonial Causes Act. In *Chetty* v. *Chetty*[8] a judicial separation was granted. Mr. De Gruyther doubts the correctness of the decision. In *Chetty's case*[8] the Court based its conclusion on two grounds: (*i*) that the disability under Hindu Law being based on religious grounds, the Courts of England would not recognise it, and (*ii*) that England is not bound to recognise the foreign law when it works injustice to its own subjects, and therefore can personally estop

8. L.R. 1909 P.D. 67.

the husband from relying on Hindu Law. The first ground overlooks the fact that the matrimonial jurisdiction has been transferred to the Divorce Court from the Ecclesiastical Courts which would not have countenanced marriage with a polygamist. Mr. De Gruyther further argues that divorce must also be granted on the ground of adultery if *Chetty's case*[8] should be right. But the House of Lords has definitely ruled that divorce cannot be decreed under similar circumstances as in *Salvesen's case*.[9] The second ground of *Chetty's case*,[8] *viz*, that of personal estoppel is not also sound because if that were correct, the wife should be able to succeed to personalty in England.

To get over these legal difficulties and doubts, Mr. De Gruyther suggests that the legislature should validate such marriages insisting on monogamy as a condition precedent to a marriage under that legislation.

Mr. V. E. Phillips of the Kansas City (Missouri) Bar has contributed to *The American Law Review* an article on the Liability of Abstractors to the Customers who go to them for abstracts of title to real property. The difficulty of securing personal knowledge regarding the titles to real property and the complexities of the real property law have brought to the front the profession of abstractors and in the United States it has become one of the highly specialised undertakings of experts. Like the other members of the legal profession, the abstractor stands in a fiduciary relation to the customer. From the nature of the work it is an undertaking involving skill and naturally the Courts have imposed on him a duty to exercise care and skill in his undertaking, with liability to damages for any errors in the abstract. But as in other contracts, only damages actually sustained by the customer by relying on the abstract will be granted to him. It is subject to the proviso that the customer must try to mitigate the damages if possible. The majority of the Courts in United States insist on privity of contract between the damaged party and the abstractor but in some States it appears to have been abrogated by statute where it appeared that the abstractor knew that the third party was relying on it. The learned author predicts that some additional rules will eventually become settled in the law of abstracts modifying the privity of contract rule. (1) If the abstractor's certificate should recite that it is for the benefit of third parties also, then on the theory of a contract made

8. L.R. 1909 P.D. 67   9. 43 Times L.R. 609.

for the benefit of third persons, relief will be given to them. (2) Courts will take judicial notice of the custom in the United States that the abstract is really prepared for the benefit of some third person and not for the owner.

The *North Carolina Review* for February has reproduced the address delivered before the Round Table section on "Wrongs" at the meeting of the Association of the American Law Schools in Chicago on December 28, 1928 by Professor Albert Coates. The learned Professor puts forth a strong plea for the fusion of pertinent criminological materials with the traditional legal materials in the courses in College on criminal law and procedure. Whereas the present system of criminal law merely gives the student what the law is as found in decisions and legislative enactments, it does not give him a knowledge of the practical situations arising in each case. "The clients do not bring him neat questions solely of property, torts, contracts, or any other one compartment of the law. As often as not they bring him problems calling for a focus of the light from half a dozen different subjects of the law. And thus he is eternally having to make new fusions, new synthesis, new integrations of law and equity, of property, torts, procedure, and the rest." In 'rest' may be included practical knowledge as well. It is not that the technical study of the law should be ignored. That is absolutely necessary but alongside with it the student must know about the workings of the legal principles he learns, and about the functioning of the legal machinery through which these principles operate. Mr. Pound says that "the strength of the common law is in its treatment of concrete controversies—in the application to *the cause in hand* of the judicial experience of the past." The learned Professor in his address points out that the proper functioning of the common law requires a knowledge of both and that the traditional law study gives only a knowledge of *the judicial experience of the past* and neglects to give a knowledge of the *cause in hand*. The materials and methods of criminology contribute to this end and should therefore be incorporated into the courses of criminal law and procedure in order to enable a lawyer the better to do a lawyer's duty. Further it is necessary that both criminology and criminal law should be fused in the brain of one teacher, for it is only then that he can bring to himself and to his teaching a new and powerful stimulus. For different teachers to teach them will be to establish an artificial dividing line between criminal law and criminology and emphasise the very gap to be filled up.

BOOK REVIEWS.

ANSON'S LAW OF CONTRACT. Edited by Sir John Miles and J. L. Brierly. Seventh edition, 1929. Clarendon Press, Oxford. Price 15*s*.

There have been several treatises written on the law of contracts and on special branches of the same. But so far as we are aware, there is none to excel Anson's Law of Contract in stating the principles underlying this branch of law in a manner suited to and interesting the student of law or a beginner. It is for this reason that it has been prescribed as a text-book for the students of law by the Madras University and we believe, by other Universities as well. It would have been a matter for regret if this standard book on this branch of law which is ever growing, were allowed to go out of date; and the editors of the present edition which is the jubilee edition of Anson's Law of Contract have earned the gratitude of lawyers and students in bringing out this work. Having regard to the rapid development of law in various parts of the law of contract, we have every reason to be thankful to the editor for having taken greater liberties with the text of the previous editions and re-written portions of the work and omitting some portions of the original matter in the present edition. The editors have referred to the alterations made by them in their preface to the work and they need not therefore be repeated here. We feel sure that this work will be continued to be studied with profit by all students of law trying to acquaint themselves with the principles of the English Law of Contracts.

THE HINDU CODE, by Sir H. S. Gour, 3rd edition, 1929. Published by Messrs Butterworth & Co. (India), Ltd. Price Rs. 30.

Dr. Gour's work on Hindu Law does not require any introduction to the lawyer. We had occasion to review the first edition of this work in some detail in the pages of this Journal (37 M.L.J. 119). We are glad to find that some of our suggestions have been accepted by the learned author in his subsequent editions, though he has not given effect to others. With reference to section 96 of the present edition, which was section 82 of the first edition, we observed that it was far from settled that possession of sridhanam property was by itself a reason for negativing a woman's right to maintenance and we referred to *Lingayya* v. *Kanakamma,* (1913) 28 M.L.J. 260: 38 Mad. 153 in support of our observations. It may be that

the learned author does not agree with the view of the learned Judges in the case which however has been arrived at after noticing the decisions referred to by the learned author in support of the contrary view in paragraph 1118 of his commentary. It may also be mentioned that the decision in *Lingayya* v. *Kanakamma*, (1913) 28 M.L.J. 260: 38 Mad. 153 referred to by us has been followed in *Kalliani* v. *Utharankat Parakkal Eashwan Raman*, 30 I.C. 897. Under these circumstances we venture to think that it would have been more appropriate if the learned author had noticed these decisions in the present edition and given his reasons for taking the contrary view. Again with reference to section 320, we referred to *Navaneetha Krishna Thevar* v. *Ramaswami Pandia Thalavar*, (1916) 40 Mad. 871: 33 M.L.J. 277 where it was held that the Court of Wards in possession of a woman's estate is not subject to the same restrictions with regard to the powers of alienation as the woman herself. This is contrary to section 320 in the author's work and it is curious that the author has not noticed it even in the present edition. Sir H. S. Gour's work has acquired a leading place among the treatises on Hindu Law and is looked upon as a book of reference. The above observations are therefore only made with the view that in subsequent editions any omissions or inaccuracies in the previous editions may be rectified, and not with any idea of finding any faults in it.

As for the idea of codifying the entire field of Hindu Law administered by the Courts, we venture to think that it is impracticable and inadvisable; and we are reminded in this connection, of the attempt in the later half of the last century made by eminent jurists and lawyers in England to codify the entirety of English Law which was, of course, not productive of any results. We are of course in favour of legislation clearing up doubts and removing hardship in those parts of the Hindu Law where they exist; but it is doubtful whether the entire personal law of the Hindus can and should be codified. As observed by Sir Courtney Ilbert, "a good text-book has often been the foundation of a Code and in the meantime is not a bad substitute." Sir H. S. Gour's present work fully satisfies Sir Courtney Ilbert's observations.

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LAW REPORTS.*

The history of the Courts in India is a subject fairly well known and hardly requires elaborate treatment. The mofussil system of courts has been already dealt with and so far as the Courts of the Presidency Towns are concerned but a few facts need be mentioned.

Mayor's Courts were the first to be established and they were superseded in Calcutta by the Supreme Court in 1773. The Mayor's Courts in Madras and Bombay were replaced in 1797 by the Recorder's Courts. The Recorder's Court in Madras was abolished in 1799 and in Bombay in 1823 and Supreme Courts were established in their stead. In 1862 the High Courts were established which took the place of the Supreme and the Sudder Diwani and the Sudder Nizamut Courts.

The Supreme Courts followed the English rules of evidence and the reforms introduced in England were introduced into India by the Acts of the Governor-General in Council. In the mofussil, the Courts were not bound to follow the English rules though they were not prohibited from so doing. The rules followed by them were composed partly of the Muhammadan rules of evidence drawn from the Hedaya and the Law Officers and partly of rules drawn from English Text Books and Law Lectures except in those few particulars in which Legislation intervened. Somewhat comprehensive Legislation was attempted by Acts XIX of 1853 and II of 1855 which extended the Reforms introduced into the Supreme Court and the Rules of

*The seventeenth of a series of lectures arranged by the University of Madras delivered by Mr. B. Sitarama Rao, Advocate, Madras High Court.

Evidence to the mofussil. The amorphous nature of the rules of evidence explains the use of copies of copies and of correspondences of Collectors and other Revenue Officers without much scrutiny which we come across in the early Reports.

The various jurisdictions of the Supreme Court were known as "Sides," the Equity Side, the Crown Side and so forth. The Reports are also arranged that way and the procedure on each side was similar to the procedure of the corresponding court in England except that the *viva voce* examination of the witnesses was taken down in writing and the depositions were signed by the witnesses.

So far as the Company's Courts were concerned there were certain enactments which more or less regulated procedure; for instance, Bengal Regulation III of 1793, Madras Regulations II and III of 1802, Bombay Regulations II of 1827 and XVII of 1827 and so forth. The practice of these Courts was more similar to that of Courts of Equity than of Common Law, rather, near to the Scottish, it is said, than to the English system. The pleadings consisted of a plaint, an answer, a reply and a rejoinder and had all to be in writing. The parties were not restricted to any particular form. Each told his story his own way. The pleadings were argumentative and sometimes very voluminous and full of irrelevant matter and repetition. They often failed to bring parties to direct issue. A Regulation passed in 1814 required the Judge after the close of the proceedings to settle the issue, but this "most wholesome regulation" (as it was called by the Judicial Committee) was much neglected in practice and parties it seems brought in Exhibits and lists of witnesses from time to time with a petition stating the point which they were meant to prove. No particular course was prescribed to be followed at the final hearing. The Judge either himself perused the pleadings and depositions or heard them read and then the parties were heard which generally meant putting questions to a vakil of one of the parties which was answered by the vakils on the other side. The answer was met by their opponents as best they could. The Judge determined both facts and law. Before the enactment of the Civil Procedure Code of 1859 the Courts had on points of Hindu and Muhammadan Law the assistance of Law Officers well versed in those laws. Though their reputation for honesty was not of the highest, much of the Hindu Law as administered is the result of their exposition. Sir Thomas Strange gives a collection of these opinions with the remarks of Colebrooke and Ellis

under the designation of "Responsa Prudentum". Sir Francis Macnaghten, Sir William Macnaghten and coming to later times Messrs. West and Buhler, and the author of Vyavastha Darpana set out the answers of Pandits on the various points that arose with their own opinion and the authorities bearing on the subject.

Many curious but well-authenticated stories are told as to the ways adopted by Courts to secure unbiassed opinion from Pandits. In a Bengal case, the opinion of Benares Pandits was taken and questions were addressed to them by Sir William Jones in Sanskrit without giving them the slightest inkling as to where the case came from. Strange's Notes of Cases of the Supreme Court record a similar attempt made by the Madras Supreme Court with the Bengal Pandits.

The present procedure dates from Act VIII of 1859, the first Civil Procedure Code. The principal improvements which it made were according to Sir Barnes Peacock (1) it enabled courts to grant injunctions to restrain waste, injury and breach of contract; (2) to appoint receivers; (3) it provided for statement of a special case, and (4) it dispensed with the technical forms of pleading in Supreme Courts. The Code as passed did not apply to those courts. The Code was made applicable to High Courts in 1862 though as we know with reservations and exceptions. The improvements since made have been: the special procedure as to charities (section 539 of C.P. Code of 1882), interpleader (by Act of 1882), summary procedure in the case of Bills of Exchange first introduced by Act V of 1866 and since incorporated into the Civil Procedure Code, procedure for suits by and against partnerships as such (by Act of 1908), provision for suits to restrain public nuisances, third party procedure, garnishee proceedings and charging orders and originating summons. Procedure for the last four remains yet to be provided though so far as the Original Side of the High Court is concerned partial provision is made for some of these things like garnishee proceedings.

The Hindu Law contains several texts relating to limitation though Vijnaneswara had great difficulty in reconciling himself to a rule extinguishing title by wrongful possession, however long. The Muhammadan Law does not seem to recognise any rule of limitation.

The first enactment in India that dealt with limitation was Bengal Regulation III of 1793 which provided that as a rule all suits should be brought within twelve years of the time at which the cause of action arose. Regulation II of

1805 fixed 60 years as the period of limitation for suits by Government. It also dealt with suits for immoveable property, penalties and summary suits for arrears of rent. It declared that, as a rule, suits for redemption or for the recovery of the property deposited should not be barred. From time to time certain further enactments were passed fixing special limitation for certain special suits like suits to contest awards by Revenue Authorities, to set aside revenue sales, etc. As to appeals rules were prescribed by various regulations. There was no rule of limitation governing execution applications but Courts adopted twelve years' rule on the analogy of suits. Such a rule was not recognised in Bombay or Madras.

In Madras, Regulation II of 1802 prescribed a rule similar to that in Bengal under the Regulation of 1793. There was no regulation fixing the time limit to suits by the Government.

In Bombay, the Limitation Law was somewhat more elaborate. Regulation V of 1827 prescribed 30 years for suits for recovery of immoveable property and of hereditary offices, 12 months for suits for damages for injury to person and reputation, to suits for debts not in writing 6 years and to all other cases 12 years. Where possession of immoveable property is procured by fraud, 60 years was the period fixed. There was no limitation for suits to recover mortgaged property unless it was held for over thirty years by *bona fide* possessor as proprietor. As in Madras, there was no period of limitation prescribed for suits by Government. *Bona fide* possession for over 30 years conferred right on land the only instance of acquisitive prescription known to Indian Law so far.

The Presidency Towns followed the English Law of Limitation which they applied even to Hindus and Muhammadans suing in those Courts. Neither 2 and 3 Will. IV, c. 7 relating to acquisition by prescription of easements nor 3 and 4 Will. IV, c. 27 dealing with suits for real property nor the portion of it dealing with limitation on actions on special debts was extended to the Presidency Towns.

Act XIV of 1859 was the first comprehensive Statute of Limitation made applicable to the whole of India. It did not apply to suits as to public property or right which continued to be governed by the law previously existing on the matter. It introduced various periods of limitation: one year to suits for pre-emption, for damages for injury to persons, etc., to set aside revenue sales and attachments for public revenue or to set aside summary decisions, three years to contest awards, suits for money lent or on contracts not written or written and not

registered within 6 months, twelve years for specialty debts, legacies and immoveable properties, 30 or 60 years for recovery of deposits and mortgaged property respectively according as they are moveable or immoveable and a residuary article of 6 years. The immunities recognised under the Act were: lunacy, idiocy, coverture in the case of married women under English Law, minority, absence of defendant out of British India, *bona fide* prosecution of ineffective suit and trust. Aknowledgment, acquiescence and laches were defences as before notwithstanding the Act in the Supreme Court. For execution limitation of three years was applied except in the case of Supreme Court's decrees to which twelve years' rule applied. As the starting point in most cases was the date of the arising of the cause of action there was very considerable doubt and a crop of litigation. There was no acquisitive prescription even for easements nor was there any provision for co-existing disabilities or substitution or addition of party. These defects were made up in the Act of 1871. The starting point was stated with great particularity in each case providing more than 180 Articles instead of the few sections of the old Act. Rule of prescription as to easements was enacted. Staying of a suit by injunction was recognised as an additional ground of immunity. Co-existing disabilities were provided for. A rule of extinctive prescription (section 28) was enacted. 60 years' rule was enacted generally as applicable to suits by Government. Certain further improvements were made by the Act of 1877. Successive supervenient disabilities as well as disability of legal representatives was provided for. Purchaser for valuable consideration from trustees was protected by 12 years' possession whether a *bona fide* purchaser or not. Written acknowledgments saved not only debts and legacies but all rights (saving rights under decree according to certain interpretation). So also payment was given an extended saving operation. Certain immunities available only to suits were extended to applications. The Act of 1908 has effected some further amendments which are more or less in the nature of drafting amendments. An amendment of 1922 makes the various grounds of immunity available for suits under special enactments. Still there is room for considerable improvement. Lot of avoidable confusion centres round "adverse possession," "specific trust," "discontinuance of possession" and "cause of action". English Law has abolished adverse possession and Indian Law may advantageously follow suit. Prescription except in the case of easements is still ex-

tinctive and considerable difficulties are felt in the working of the rule.

Before we pass on, an account of the Criminal Courts, their procedure and the law that they administered may also be given here. The Moghul system which was retained for some time by the British was first the Nazim or the Supreme Magistrate who presided personally in the trial of capital offenders, the Deputy of the Nazim who took cognizance of quarrels, frays and abusive names, the Foujdar or the Officer of Police who was the judge of all crimes not capital. Reports of capital offences had to be sent up by him to the Nazim who would deal with them. Mohtesib was a special officer dealing with drunkenness, the vending of liquors, and the use of false weights and measures. These were courts of the capital. In the mofussil the administration of justice lay with the zamindars. In his Foujdari Court, he inflicted all sorts of penalties, but before executing death sentence he had to report the case to the capital. There was no regular course of appeals from these Zamindari Courts, but the Government interfered on complaint if they considered the case was one that deserved interference. The administration of justice was naturally very unsatisfactory and various attempts were made to improve the same and those attempts failing, in 1772, a new system of courts was introduced. In each District Foujdari Adawlut was established composed of a Kazi, a Mufti and two Moulvis who tried the case in the presence of the Collector whose duty it was to see that the cases were properly tried. A Superior Court was established at Murshidabad called Nizamut Sudder Adawlut, the officers of which were a Daroga, the Chief Kazi, the Chief Mufti and three Moulvis. They formed a Court of Revision as to the proceedings of the Foujdari Adawlut and in capital cases they had to signify their approval or disapproval of convictions and had also to prepare the sentence for the warrant of the Nazim. It will thus be found that referred trials are an ancient institution in the country and such of you as are students of Indian History must have read that in the extensive Empire of Aurangazeb no death sentence could be carried out without the previous sanction of the Emperor who passed orders after personally attending to the facts of each case. The arrangements made in 1772 also proving unsatisfactory, in 1793 an altogether different system was adopted and that was the system of Zillah Courts in each district presided over by Civilian Judges and above them four Provincial Courts of Appeal and a Sudder Diwani Adawlut or a Supreme Court. But all these was for civil work. The criminal work was

done by the Judges of Provincial Courts of Appeal who went on circuit to each Zillah. The Judges tried the case and the Kazi and the Mufti who were present had to write the sentence at the bottom of the record. If the Judge agreed with the sentence, it was passed except in capital cases which had to be referred for the approval of the Nizamut Adawlut which consisted of the same judges as the Sudder Diwani Adawlut. In the first instance, it was composed of the Governor-General in Council, but the composition was later on altered into one exclusively of Civilian Judges. In time the Provincial Courts also were abolished the criminal jurisdiction being conferred on the Zillah Judges. Thus the final form of Criminal Courts in Bengal was the Sudder Nizamut Adawlut and the Sessions Judges and Magistrates. These exercised jurisdiction over natives of India in the mofussil, but over Europeans the Supreme Court alone had jurisdiction. The system thus introduced was extended to North-West Provinces when they were acquired. The law administered by these courts is the subject of a digest known as Beaufort's Digest. In Madras the Appellate Court was known as Sudder Foujdari Adawlut. It was established in 1802. It got its Civilian Constitution in 1806. The Provincial Courts of Appeal exercising criminal jurisdiction were abolished in 1843.

The law administered was a compound of the Law of Koran, instructions from the Government, Regulations and Acts dealing with evidence, the ideas of justice and analogies and in fact everything that occurred to those who administered justice in those days. The Mahomedan Criminal Law which was supposed to be administered by these courts was a curious admixture of great vagueness and extreme technicality. To give an instance, there were five kinds of homicide: a wilful homicide by a deadly weapon, homicide like wilful homicide where the instrument was not likely to cause death, erroneous homicide or killing under a mistake, involuntary homicide by involuntary act and accidental homicide as where a man unlawfully dug a well and another fell and was drowned. Poisoning was not regarded as intentional homicide and there was acute controversy as to whether strangling was. It punished adultery with death. Mutilation was a recognised mode of punishment for robbery. Somewhat similar institutions were introduced also in Bombay.

The Penal Code was passed in 1860 and was followed a year afterwards by Act XXV of 1861, the first of the Codes of Criminal Procedure and with them and the establishment of the

High Courts, we come to the modern system. The Criminal Procedure Code of 1861 was not applicable to the Chartered High Courts or the Chief Courts in their original jurisdiction or the Presidency Magistrate and allowed a right of appeal to the Crown which is not recognised by the English Law except in those cases of writs of error with which we have dealt already or as provided by the Statute of 20 and 21 Victoria in the case of Courts of Summary Jurisdiction when the order of the Court is erroneous in point of law or is in excess of jurisdiction. The changes since effected in the procedure have been mainly in the matter of the trial of European accused, the institution of criminal proceedings, *i.e.*, sanction, etc., the enlargement of the list of offences that can be compounded and the introduction of provisions like section 562 dealing with first offenders Various Acts were passed assimilating the procedure of the Courts of the Presidency Towns to some extent to those in the mofussil and ultimately in 1882 a comprehensive Code of Criminal Procedure was passed applicable to both Mofussil Courts and the Courts operating in the Presidency Towns. It combines, it is said, the merits of the English or the accusatory system with some of the facilities afforded by the continental or inquisitorial system. The reference is here to the examination of the accused provided for in the various sections of the Criminal Procedure Code. The Indian Criminal Procedure provides for appeals and revisions to a much greater extent than the English procedure.. Even its final form after the Act of 1908 as amended recently, it will be noticed, does not embody the developments suggested by modern Criminology such as are to be found in the English Children's Act, Prevention of Offences Act though it must be conceded that effect is sought to be given to some of them by executive orders. The right to postpone sentence in deserving cases was claimed by the High Court of Calcutta as part of its inherent powers. The Mofussil Courts cannot, of course, claim this inherent power. The Code of 1872 gave to Appellate Courts power to enhance sentence while dismissing the appeal of the accused. This power is taken away and only the High Court has power to enhance sentence by way of revision in the later Acts. The Penal Code is one of the much praised Acts of Indian Legislature and in spite of its many defects has served its purpose fairly well. Its sentences can hardly be said to be other than monstrous. No civilised country to-day imposes such heavy sentences as does the Penal Code. Heavy sentences have long gone out of fashion

in England and the odor of sanctity and perfection attaching to the Penal Code should not deter indigenous legislatures to thoroughly revise the sentences and bring them into conformity with modern civilised standards.

The Reports of the Nizamut Court of Bengal as well as the Foujdari Court of Madras are available and though their value to the practical lawyer is of the slightest, to the historian of law in India they must afford ample materials for its reconstruction.

An Act of 1843 required the judgments of the Sudder Court to be recorded in English and the decisions came to be issued monthly for the benefit of the public from 1845. In 1850, marginal abstract of the decisions came to be added. The decisions of the Agra and the Madras Courts came to be similarly published in 1846 and 1849 respectively. The series continued right up to the establishment of the High Court. In 1850 one Mr. Bellasis published a small volume of the reports of the decisions of the Sudder Diwani Adawlut of Calcutta from 1840—1848, for the most part decisions of the Full Court. In 1851 a monthly series of Nizamut Adawlut decisions began to appear—in Madras also about the same time monthly reports of the Sudder Foujdari Adawlut. Sudder Foujdari Adawlut reports of Bombay from 1827-1846 were published in 1848. Since 1844, select reports, that is, cases selected out of the monthly reports as cases deserving of being treated as precedents, were published with notes. In 1848, the publication was discontinued by a resolution of the court. In Bombay, Borrodaile, a Judge of the Sudder Adawlut of Bombay, published a volume of reports of the decisions of that Court. The Sudder Court had some distinguished Judges, among others Colebrooke and Macnaghten of Calcutta. Colebrooke was Chief Judge of the Sudder Diwani Adawlut from 1801-1816.

Morton's Reports are the earliest reports of the Supreme Court of Calcutta. They cover the long period from 1774 to 1841. For parts of the same period, you have Bignell's Reports, 1830 to 1831, Montriou's Reports, 1846 and Fulton's Reports, 1835 to 1844. Montriou published select cases from Morton, which are called Morton's Reports by Montriou. Taylor's Reports are for 1847 and 1848, Taylor and Bell's Reports from 1849 to 1853, and Boulnois from 1853 to 1859. Gasper has a Commercial Cases, 1851 to 1860 and another volume of decisions in Small Cause Court Cases by the Supreme Court.

These Reports contain decisions of great value to the historian. They show how these Judges, some of them great and sound lawyers, were groping towards a statement of the law which should not wound their susceptibilities as English Lawyers and at the same time should be free from the insular and technical features of the English law and suit the widely altered conditions of India. For instance, the very first page of Morton's Reports contains the case *Ex parte Commula,* where the question was whether the Court could grant administration in respect of the estate of a Hindu, and, if it could grant, whether the administration should be according to the Statute of Distributions or according to Hindu Law. Sir Elija Impey and the other Judges after great doubt and difference of opinion ultimately came to the conclusion that administration could be granted but that the distribution should be according to Hindu Law. In 1778 the Judges will be found gravely discussing whether a repugnancy between the English date and the Indian date given in the plaint should non-suit the plaintiff. The earlier judgments in Morton are from the Notes of Sir Edward Hyde East and are somewhat short, but the judgments of later date as well as the judgments reported in the other series are fuller with facts, arguments and judgments. There are many judgments showing great research and learning. For instance, we have an elaborate judgment as to the validity of mortgages without possession under the Hindu Law in Fulton, p. 37. The judgments of the Sudder Court used to be quoted in the Supreme Courts and *vice versa* though they were not absolutely binding. The authority of these reports and the extent to which they are binding on the High Courts is discussed in 4 Rangoon 313. The Sudder Court decisions contrast unfavourably with those of the Supreme Court in that they exhibit neither the elaborateness nor the knowledge of the Supreme Court judgments. The judgments are short and as brevity is not necessarily wisdom, they do not give the satisfaction which fully considered judgments give. The successive Chief Justices of the Supreme Court of Calcutta were Impey, Anstruther, East (1817), Grey (1826), Ryan (1837), Peel (1842) and Colville. Ryan and Colville subsequently went to the Privy Council. Like the English Judges of old, some of these Judges had their Notes. For instance, Hyde East's Notes of Cases (1791 to 1819) like those of Perry in Bombay or Strange in Madras are the only records we have of the early performances of these Courts. For Bombay, we have another Report of Cases illustrative of

oriental life and the application of English Law to India by Sir Erskine Perry who is regarded on all hands as something of a genius and one of his famous judgments is the Khoja case. The Reports are very highly regarded. For the Calcutta High Court after it is constituted we have regular Reports from 1862. Indian Jurist (O.S.) for 1862 reports the original side and original appellate judgments of that Court and Privy Council decisions coming from that Court. For the Full Bench we have the Weekly Reporter Full Bench for 1862 to 1865. For the appellate side we have Hay's Reports and Marshall's Reports (1862—1863). Coryton (1862—1863), Hyde (1863—1864) and Bouke 1865 deal with the original side. Indian Jurist (N.S.) deals with 1866 and 1867. From 1868 we have the Government publication known as the Bengal Law Reports. The Weekly Reporter by Sutherland begins in 1864 and goes up to 1876. The Weekly Reporter is one of the worst abused though by no means the least useful reports we have. In 27 Cal. 965 Lord Hobhouse referring to a decision therein reported says: "That report is one of the large number contained in the Weekly Reporter which are useless or misleading, because the facts of the case are not stated." Many of the recent non-official Reports share this quality with the Weekly Reporter, but they have not so far had the distinction of being remarked on by the Privy Council. Many of the cases in the Weekly Reporter are also reported in the Bengal Law Reports which err if at all on the other side of overreporting of facts and arguments. The earlier volumes of the Weekly Reporter had separate pagings for Civil Rulings, Miscellaneous Rulings, Criminal Rulings, Full Bench Rulings and Privy Council Rulings which was reduced later on from 16 W.R. into Civil Rulings and Criminal Rulings. Hay and Marshall are much prized Reports. They contain some valuable judgments of Sir Barnes Peacock. Reports of some early decisions both of the Sudder and the Supreme Courts dealing with Hindu Law are to be found in Text Books like Sir Thomas Strange's Book on Hindu Law, Sir Francis Macnaghten's Considerations of Hindu Law, Sir William Macnaghten's Principles and Precedents of Hindu and Mahomedan Law, The Vyavastha Darpana, Morley's Digest and West and Buhler's Digest of Hindu Law. Even valuable Privy Council decisions will be found so imbedded. These last have been picked up and published along with those found in other recognised sources in the Indian Reports by Sanjeeva Rao and others. The famous names connected with the Sudder Court are those of

W.R. 61 (F.B.)]. Markby wrote the remarkable judgment in which he held with Romesh Mitter, J., that a decree for restitution of conjugal rights cannot be enforced either by handing over the wife bodily to the husband or by putting her into jail. His judgment is a most learned and comprehensive judgment and showed him to be much in advance of the times though his view has not yet been accepted fully by the Legislature. Order 21, Rule 33, Civil Procedure Code, is a partial vindication of his point of view. His judgment in 4 Cal. 142 on *de facto* representation in suits shows a wider outlook than that of the majority and the principle has been followed since. Phear, J., was another of the striking personalities on the Bench. He subsequently became Chief Justice of Ceylon. Sir Richard Couch came to Bengal as Chief Justice after acting for some time as Chief Justice of Bombay. Sir Richard Couch does not seem to have occupied the same dominating position as Sir Barnes Peacock. The fact that for many years the Privy Council was manned by Bengal Lawyers has given the decisions of that tribunal a distinctly Bengal tone. Ryan, Colville, Peacock, Couch, Wilson and later on Ameer Ali have been all judges of Calcutta and it is difficult for anybody to shake off his early predilections and training and as a result the Bengal view-point was heavily weighted in the Privy Council and the other points of view suffered. The predominance of Colebrooke coloured for a time even the interpretation of certain terms of the Mitakshara and the genuine Mitakshara point of view elaborated by the Bombay and Madras Judges did not receive due consideration till it was too late, having regard to the course of decisions to hark back to the original authorities.

From 1875 the Law Reports commence.

SUMMARY OF ENGLISH CASES.

G. SCAMMELL AND NEPHEW, LIMITED *v.* HURLEY AND OTHERS, (1929) 1 K B. 419: 98 L.J.K.B. 98.

*Conspiracy—Borough Council—Duty under statute and by contract to supply lighting and power—Strike—Inability to supply for both—*Bona fide *stoppage of power—Acts done in* bona fide *intended execution of the statutory body—Action for damage suffered thereby—Action commenced more than* 6 *months after the acts complained of—Public Authorities Protection Act.*

The Stepney Borough Council was bound by statute and by contract to supply owners or occupiers within its borough elec-

tricity for power and lighting. In April, 1926, a general strike was threatening and a committee of the council which was in sole charge of the electricity concern met and *bona fide* decided that if the Electric Trades Union would continue lighting, the committee would abandon the supply of power. The Union agreed and during the strike the power was stopped The plaintiffs sued certain *individuals* of the committee, alleging that they wrongfully and maliciously conspired and combined amongst themselves and with the Electricity Trades Union and stopped the supply of power thereby causing damage to the plaintiffs. The action was commenced more than 6 months after the acts and neglects complained of.

Held, that the acts complained of having been done in intended execution of the statute and not from any improper motive, such as spite or a purpose entirely outside statutory justification, the defendants were protected by the Public Authorities Protection Act and the action was barred as being more than 6 months after the neglects complained of.

Per Greer, L J. and (*Semble*) *Scrutton* and *Sankey, L.JJ.*—The Corporation itself could not have been sued for the damages arising from the failure of supply and much less therefore can a committee to whom management is committed. The rule of law established in *Lumley* v *Gye,* (1853) 2 E. & B. 441, is not applicable to the case of a servant or agent on behalf of his principal breaking a contract made with that principal.

Per Greer, L.J.—If a plaintiff gives no evidence in support of his case the fact that a defendant's denial is not entirely satisfactory cannot be used as proof of propositions of which the plaintiffs have failed to give evidence.

Per Greer and *Sankey, L.JJ.*—The rule in *Selmes* v. *Judge,* (1871) L.R. 6 Q.B. 724, that if a person knows that he has not under a statute authority to do a certain thing and yet intentionally does that thing he cannot shelter himself by *pretending* that the thing was done with intent to carry out that statute, does not apply to a situation such as the present, where in order to perform one part of their duty (*viz*, supply of electricity for lighting) under the Act, it was inevitable that there should be a default in carrying out another part of such duty.

WILLIAM BEAN & SONS *v.* FLAXTON RURAL COUNCIL, (1929) 1 K.B. 450.

Corporation—District Council—Appointment of sub-committee to enter into contract—Contract beyond Corporation's

powers—Relaxation of by-laws—If sub-committee can validly contract.

In building certain houses, the plaintiffs had failed to comply with certain by-laws of the District Council regarding drainage and consequently differences arose between the Council and the plaintiffs. The District Council appointed a sub-committee expressly to settle these differences and the Committee agreed that in the event of the plaintiffs doing certain things like submitting a lay-out plan, etc., the drainage should remain as at present.

Held, that it being beyond the powers of the Council itself to so act in defiance of the existing regulations as to drainage, the sub-committee could have no greater powers and that therefore the agreement was invalid.

FARNWORTH *v.* MANCHESTER CORPORATION, (1929) 1 K.B. 533: 98 L.J.K.B. 224.

Corporation—Authority to erect an electricity generating station—Nuisance—If authority to erect confers authority to damage third person's property—Nature of statutory authorities.

By the Manchester Corporation Act, 1914, the defendant corporation was empowered to erect a generating station for electricity and to acquire the land in question for the purpose. The Corporation so acquired the land and erected on it a large station with 50 chimneys which in the process of generating electricity emitted large quantities of sulphuric acid thereby damaging the plaintiff's land near by.

Held, by Scrutton and Sankey, L. JJ. (Lawrence, L.J. dissenting) that the Courts, in construing private acts, act on a presumption that power to damage the property of a person is not intended unless clear words to that effect are used and from the mere fact that power to erect a generating station was given, it cannot be presumed that such power in itself chartered the commission of a tort unless it was incidental to the exercise of the statutory authority and not preventible by reasonable precautions.

Quebec Railway, Light &c., Co. v. *Vandry,* (1920) A.C. 662 applied.

Per Lawrence, L. J.—"The Legislature has frequently invested public bodies with powers, the exercise of which, although inter-fering with the private rights of individuals, are of

advantage to the public" and "the real question in all those cases is whether, on a sound construction of the particular statute in question, the Legislature has or has not expressed an intention that the thing complained of may be done notwithstanding that it injures others" and no action for damages or nuisance will lie for doing that which the Legislature has authorised, if it be done without negligence.

Truman's Case, (1885) 11 A.C. 45 applied.

BARROW, LANE AND BALLARD, LTD. *v.* PHILLIP PHILLIPS AND CO., (1929) 1 K.B. 574: 98 L.J.K.B. 193.

Sale of goods—Parcel of specific 700 bags at wharf—Part of the bags lost before date of contract—Loss not known to parties at the time of contract—Validity of contract.

By a contract for sale, the plaintiff sold to defendant company 700 bags in one lot lying at London National Wharves, but at the time of contract 109 bags had been abstracted without the seller's knowledge. The defendants handed to the plaintiffs two bills of exchange in return for a delivery order on the wharfing company. After the date of the contract some more bags were taken away with the result the purchasers got only 150 bags. The question arose as to the liability of the purchasers for the bags abstracted after contract.

Held, by Wright, J., that a contract for a specific parcel of 700 bags is something different from a contract for 591 bags and the position is as if the whole 700 bags had ceased to exist. To compel the buyer to take 591 bags in those circumstances would be to compel him to take something which he had not contracted to take and would be unjust. But if the whole 700 bags had remained in the wharf at the date of the contract, the fraudulent abstraction after that date would fall on the buyer as the property passes to the buyer by the sale.

ANSELL *v.* INLAND REVENUE COMMISSIONERS, (1929) 1 K.B. 608: 98 L.J.K.B. 384.

Revenue—Stamp Act, 1891 *and Finance Act,* 1910*—Settlement—Voluntary disposition* inter vivos*—Chargeable as a transfer with regard to some items—Transfer of Government stocks—Duty payable on them—If as a transfer or as a settlement—Dispositions by a single document and same words if "distinct matters" because they deal with different goods.*

By one instrument, a settlor voluntarily disposed of some properties including certain Government stocks. The settlement also operated as a transfer *inter vivos* of the other properties and therefore was chargeable under S. 74, sub-section (4) of the Finance Act, 1910, as a conveyance only and not as a settlement. By a provision in the first schedule, transfer of Government stocks were exempt from stamp duty. The question arose if the Government stocks were not liable to duty on the basis of a settlement as they were included in an instrument with other stocks which were chargeable with duty as on a transfer.

Held, that the deed, so far as it concerns the Government stocks, deals with them as a distinct matter just as if it was a separate deed. If two different classes of property are transferred by the same words of assignment in the same document and those two properties are different from the point of view of Stamp Act and taxation, they are to be treated as "distinct matters" for purposes of stamp duty and be separately charged with duty.

In re A DEBTOR, (1929) 1 Ch. 362: 98 L.J. Ch. 38.

Bankruptcy—S. 1, Sub-sec. (1) (h), Bankruptcy Act, 1914—A statement by debtor and a representative of petitioning creditors of his intention to offer composition—If a notice that the debtor "has suspended or is about to suspend payment of his debts."

At an interview in London between the debtor and an agent appointed to represent the petitioning creditors avowedly for the purpose of discussing with the debtor his prospects of liquidating the debt due to the creditors, the debtor stated orally that it was his intention in the event of the Swiss creditors adopting a certain composition to get into touch with his English creditors and offer them a composition also and that if the Swiss did not agree to the suggested composition, then the English creditors may file a petition in bankruptcy against him.

Held, that the oral statement evinced a clear intention on the part of the debtor to suspend payment of his debts and was a notice to the creditors through the agent that he had suspended payment of his debts within the meaning of S. 1, sub-section (1) (*h*) of Bankruptcy Act, 1914.

Per Greer, L.J.—"A mere statement that a debtor is in difficulties and cannot pay his debts" is not an act of bankruptcy unless there is the intention to suspend payment.

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GRANT *v.* DERWENT, (1929) 1 Ch. 390: 98 L.J. Ch. 70.

Trespass—Soil above sewer in plaintiff's ownership—Defendant's premises adjoining it—Corporation connecting the defendant's drain with the sewer at defendant's request and expense—Corporation statutorily empowered to do it—If agent of defendant.

The plaintiff was the owner of certain property underneath a strip of which was a sewer laid down by the then Local Board. On the other side of the plaintiff's road, the defendant built a number of houses and requested the Corporation of the place to connect the drainage to those houses with the sewer underneath the plaintiff's lands at the defendant's expense in exercise of its statutory powers. The Corporation got on to the plaintiff's land to so connect it and the action was brought for trespass against the defendant on the ground that though the Corporation did the actual work, it was at the request and expense of and as agents for the defendant that they did it.

Held, the defendant was quite within his rights in requesting the Corporation to do this work which it was its business to do and which it had power under the statute to do. It was the Corporation which did the work of its own accord and not as agent for the defendant as he had no power to control its actions or to say in what manner or under what powers the connection should be made.

VERNER-JEFFREYS *v.* PINTO, (1929) 1 Ch. 401.

Moneylenders Act, 1927, *S.* 5—*Introduction to moneylender of a customer by a tout—Loan by lender—Tout not employed by the lender to invite any person to borrow—Transaction if legal.*

Where a money-lender advanced moneys to a person introduced to him by a canvasser or tout, not employed by the moneylender for the purpose, the question arose if the transaction was legal and enforceable.

Held, by the Court of Appeal (Lawrence and Russell, L.JJ., Lord Hanworth, M.R., dissenting) that mere acting as agent or canvasser does not render the transaction illegal. The agent must have been employed by a money-lender or any person on his behalf for the purpose of inviting, etc. Where a statute is susceptible of two readings, that version must be chosen which lessens the list of misdemeanours rather than that which increases it.

["Section 5, Sub-section (3), Moneylenders Act, 1927:— "No moneylender or any person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a money-lender, and no person *shall act as* such agent or canvasser, or demand..............for introducing.........to a money-lender any person desiring to borrow money."]

KENNEDY *v.* THOMASSEN, (1929) 1 Ch. 426: 98 L.J. Ch. 98.

Contract—Offer and acceptance—Offer by trustees under a will to redeem an annuity—Offer accepted by annuitant and a release deed executed and signed—Death of annuitant after communication to her solicitor but before communication to the trustees—If contract complete by mere acceptance and release.

With a view to commute certain annuities payable under a will to A, the trustees under the will proposed to A through her solicitors a commutation at a certain figure. After some negotiations, A agreed to the commutation figure, and on the 12th executed and sent a release deed to the solicitors to be given to the trustees on the commuted amount being paid. The solicitors wrote to the trustees only on the 24th accepting the offer and asking them to pay the amount. Meanwhile A died on the 17th. The trustees paid the amount to the solicitors in ignorance of the death. The release was undated and the solicitors inserted the date 30th and gave it to the trustees. In a claim by the trustees for repayment of the amount,

Held, this is not a case in which the posting of the acceptance concluded the contract. The acceptance was not in fact communicated to the trustees' solicitors until the 24th by which time the authority of A's solicitors to act for A and communicate the acceptance on her behalf ceased by her death on the 17th. Also the contract was not complete by mere execution of the release deed as the purchase price had also to be ascertained and the death of the annuitant has rendered the contract incapable of performance in that there was no consideration which the purchaser would receive for his money.

In re TAYLOR'S SETTLEMENT TRUSTS. PUBLIC TRUSTEE *v.* TAYLOR, (1929) 1 Ch. 435: 98 L.J. Ch. 142.

Bankruptcy—Power to require income of any year to be paid as to one moiety to bankrupt and as to the other to his wife—

Power exercised for the year—Power exercisable by bankrupt if "for his own benefit"—*Bankruptcy Act,* 1914, *S.* 38, *Sub-S.* (*b*).

A power which cannot be exercised for his own benefit alone but for the mutual benefit of himself and another is not a power to appoint for one's own benefit within the meaning of S. 38, Sub-S. (*b*) of the Bankruptcy Act, 1914; but if the power is exercised, any benefit derivable therefrom will pass to the trustee in bankruptcy.

CHANEY *v.* MACLOW, (1929) 1 Ch. 461.

Vendor and purchaser—Auction sale—Sale of freehold house—Highest bidder refusing to sign the contract—Auctioneer signing it instead—Signed not in the sale room but at auctioneer's office—Extent and duration of auctioneer's authority.

At a sale by auction of a freehold house held by the plaintiff the defendant was the highest bidden and consequently the house was knocked down to him. But when the junior clerk of the auctioneer went to him for particulars *re* his name etc., he refused to sign the contract on the ground that he had not seen an onerous condition in the sale before. After the day's auction was over, the plaintiff was informed by his clerk of the protest but as the defendant did not go to him at his office even after two hours, he signed the contract as the defendant's agent. In an action for specific performance of the contract, it was contended that the auctioneer had no authority to sign the memorandum (*i*) after the purchaser had clearly indicated that he would not sign it, and (*ii*) at his own office after leaving the sale room.

Held, by the Court of Appeal (affirming the judgment of Maugham, J.), the auctioneer is by the nature of his employment an agent of both the buyer and the seller and the authority is not limited to making an entry in the particulars of sale but extends to making out a proper memorandum of the sale sufficient to satisfy the Statute of Frauds, and signing such a memorandum on behalf of the vendor and purchaser. There is no definite period of time within which the authority must be exercised, the only rule being that it must be exercised within a reasonable time so as to form part of the transaction of the auction sale and where as here the auctioneer goes to his office in the reasonable expectation that the defendant would call and sign the contract there, the sale may be said not to have been over till then.

In re LEWIS MERTHYR CONSOLIDATED COLLIERIES, LTD. LLOYDS BANK, LTD. *v.* THE COMPANY, (1929) 1 Ch. 498.

Companies (Consolidation) Act, 1908—S. 107—Floating and fixed charges—Re debentures—Appointment of receiver—Preferential creditors—Claim of—Question of priority.

Lloyds Bank, Ltd. were the holders of the first and second debentures of the Company, the first one being secured by fixed as well as floating charges on the Company's assets. A receiver was appointed to take charge of the assets and manage the affairs of the Company. Under the Companies Act compensation payable to the employees of the company would rank as a preferential claim over any floating charge, and the question arose if such priority extended even over the assets of the company subject to the fixed charge created by the debentures.

The Court of Appeal (affirming the judgment of Tomlin, J.) *held,* that upon a true construction of S. 107 of the Companies (Consolidation) Act, 1908, the right of priority of the preferential creditors extends only over the debentures secured by a floating charge and not over those secured by a fixed charge.

Per Lawrence, L J.—"In my judgment the fact that the debenture in the present case is one which combines with the floating charge, a fixed charge does not bring the section into operation as against the assets comprised in the fixed charge."

ATTORNEY-GENERAL *v.* LONDON AND HOME COUNTIES JOINT ELECTRICITY AUTHORITY, (1929) 1 Ch. 513: 98 L.J. Ch. 162.

Statutory body—Scheme of powers—Power to promote or oppose Bills "for the purpose of the scheme" *at Corporation's cost—If grants expressly or impliedly power to promote a Bill to improve the scheme.*

Where a statutory body was authorised to promote or oppose any Bill in Parliament for "the purpose of the scheme", the question arose if it could expend its fund in promoting a Bill which is outside the purposes of the scheme giving more extensive powers.

Held, that the scheme specifically grants such a power only to promote a Bill for the purposes of the scheme and, in the face of such an express power, the defendant body cannot be said to have an implied power to promote such a Bill.

CUMMING AND WEST, *In re.* NEILSON AND CRAIG *v.* THE TRUSTEE, *Ex parte,* (1929) 1 Ch. 534: 98 L.J. Ch. 83.

Bankruptcy—Partners A and B—Prior ante-nuptial settlement by A—Covenant thereunder by settlor to keep alive an assurance policy on his life—Breach of such covenant—Trustees under settlement proving for compensation in A's bankruptcy—Rejection of proof by trustee in bankruptcy if proper—If the claim is postponed to those of joint creditors of A and B—Bankruptcy Act, 1914, *S.* 33, *sub-sec.* (6), *S.* 42, *sub-sec.* (2) *and S.* 63, *sub-sec.* (1).

Two partners A and B were adjudicated bankrupts in 1927. In 1910 A had executed an ante-nuptial settlement by which he had assigned in favour of the trustees a life assurance policy on his life and he had covenanted with the trustees to keep it alive, and in default to pay sufficient sum to secure that benefit. The trustees under the settlement put in in A's bankruptcy a proof of claim for £386-6-3 which they claimed to be due to them as compensation for the breach of covenant to pay the premiums on the policy. The trustee in bankruptcy rejected the claim on the ground "that by reason of the provisions of S. 42, Sub-S. (2) of the Bankruptcy Act, 1914, the said claim for dividend is postponed until all the creditors for valuable consideration in money or money's worth have been satisfied." On an application by the trustees under the settlement, the question arose whether the claim was postponed not only to the claims of separate creditors of A but also to those of the joint creditors of A and B.

Held, that the proof was properly rejected for the reason that the covenant on which the claim is based is obviously one for the future payment of money and the fact that it is taken for the protection of the property which has been assigned will not prevent it from being one for future payment of money within the language of S. 42, Sub-S. (2). Also the claimants are not 'creditors' within the meaning of that section, these being given only "a special right, namely, a right to claim a dividend in the settlor's bankruptcy under or in respect of the contract, after all the claims of the other creditors for valuable consideration have been satisfied".

BERNHARDT *v.* GALSWORTHY, (1929) 1 Ch. 549: 98 L.J. Ch. 284.

Law of Property Act, 1925—*Receiver in an administration action—Distributing rents and profits among 36 persons—Statutory trust for sale—If can exercise without leave of Court.*

A receiver appointed in an old administration action was to receive the rents and profits and distribute them amongst 36 persons, the distribution to continue until the death of a certain person. The legal estate was vested in the defendant (Public Trustee) and on the Property Act, 1925, coming into force, he became invested with the statutory trusts for sale as it was held in trusts for several persons as tenants-in-common. But the question arose, if he could exercise the power of sale without leave of Court.

Held, by *Eve, J.*—That the decision in *Cardigan* v. *Curzon-Howe,* (1885) 30 Ch.D. 531, applied and that the sanction of Court was not necessary as the statutory trusts displace the trusts for the execution of which the decree was made.

In re MICHELL. THOMAS *v.* HOSKINS, (1929) 1 Ch. 552: 98 L.J. Ch. 197.

Will—Two codicils to it written on the same date—One practically a duplicate of the other but for some slight verbal alterations—Attested by the same persons—If substitutional or cumulative.

A few months after the will, a testator executed two codicils on the same day, one practically a duplicate of the other except for the slight difference in some minute details. The codicils were witnessed by the same persons also. A year later he executed a third codicil by which he made some further specific bequests, "besides those mentioned in my will or codicils." The question arose if the legacies given by the first two codicils were copies one of the other or cumulative.

Held, there was sufficient in the two codicils to rebut the presumption that gifts by two testamentary documents to the same individual ought to be treated as cumulative and not substitutionary.

WEBB *v.* WEBB, (1929) P. 159: 98 L.J.P. 72.

Divorce—Petition by wife to extinguish the interest of the husband and others under the marriage settlement—Jurisdiction of Court to grant—Interest of third persons if can be extinguished also.

By a marriage settlement, certain funds were held in trust for the husband and an interest was also created in favour of her next of kin. On a decree absolute being made dissolving the marriage, the wife moved for the extinction of the interests in the funds of persons other than the wife.

Held, the Court has jurisdiction to extinguish the interest of the husband in the wife's fund, but will not do anything to prejudice the interests of the next of kin, unless there are no living persons who will be prejudiced or they consent to the order.

EARLY, SMITH AND PAVEY, *In re.* THE TRUSTEE, *Ex parte*, (1929) 98 L.J. Ch. 34.

Construction—"Shall" if peremptory—Deed of Arrangement Act, S. 11—Failure to give security in 7 days—Court if can extend the time.

The trustee under a deed of arrangement omitted by inadvertence to furnish a required security to the Registrar which by S. 11 of the Deeds of Arrangement Act, 1914, ***shall be*** given within seven days.

Held, the time allowed is peremptory and cannot be extended.

DEW *v.* UNITED BRITISH STEAMSHIP CO., (1929) 98 L.J.K.B. 88.

Contributory negligence—Coal trimmer—Injured by falling from an open hatchway—Statutory duty to fence the hatchway—Failure of—Knowledge of coal trimmer—Negligence in not taking precaution—Contributory negligence if a defence for breach of statutory duty.

The plaintiff, a coal trimmer, tumbled down an open hatch on a ship and broke his leg. In an action for damages for such injuries, it was found that though the ship-owners were negligent and failed to fence it as per their statutory duty, the plaintiff knew of the openness of the hatch and was negligent also in that he did not take sufficient precaution.

Held—"The defence of contributory negligence means that an accident has happened, contributed to by the negligence of both sides and that neither had a chance, after the negligence of the other, of avoiding it by reasonable care." The defence of contributory negligence is a good defence to an action based on breach of statutory duty.

Admiralty Commissioners v. *S. S. Volute*, (1922) 1 A.C. 129: 91 L.J.P. 38 followed.

ANCHOR DONALDSON, LTD. *v.* CROSSLAND, (1929) A.C. 297.

Workmen's Compensation Act, 1925, *S.* 12—*Employer—Ending a weekly payment—Reference to arbitration by work-*

man—Arbitrator awarding interim compensation—Jurisdiction to.

The employer who had all along been paying compensation to the workman subsequently stopped it on the ground that the workman had recovered and the incapacity ceased. The workman disputed it and applied to an arbitrator claiming compensation at the former rate and for an interim award pending the arbitration.

The question arose if the arbitrator is entitled to grant interim compensation before he is satisfied after inquiring into the facts that the incapacity exists.

Held, the right to award compensation is vested in the arbitrator and that gives him seisin of the dispute relating to compensation. To decide otherwise would mean that, in a statute based upon the principle that arbitration and not the usual proceedings in the courts should be the means of settling disputes, an interim matter in the arbitration is to be settled by those very Courts, the authority of which has been excluded.

Ocean Coal Co. v. *Davies,* (1927) A.C. 271 and *Niddrie and Benhar Coal Co.* v. *Dee,* (1927) A.C. 299 distinguished.

BLACKWELL *v.* BLACKWELL, (1929) A.C. 318: 98 L.J.Ch. 251.

Will—Legacy in favour of five persons on secret trust—Memorandum written down by a trustee of the particulars of the secret trust on the same date—Will declaring that the legacy was fiduciary—Parol evidence of trust—Admissibility of.

A testator by a codicil to his will gave and bequeathed to five persons as trustees a certain sum with uncontrolled discretion to apply the income arising therefrom "for the purposes indicated by me (testator) to them (trustees) with full power at any time to pay over the capital to such person or persons indicated by me as they think fit." One of the trustees made a memorandum of the terms of the trust on the same day. The trustees accepted the legacy also. The residuary legatee brought this action for a declaration that no valid trusts of a legacy of the above sum was declared by the testator in favour of the secret beneficiaries on the ground that the parol trust was hit by S. 9 of the Wills Act.

Held, affirming the Court of Appeal, that "it has long been settled that if a gift be made to a person or persons in terms

absolutely but in fact upon a trust communicated to the legatee and accepted by him, the legatee would be bound to give effect to the trust, on the principle that the gift may be presumed to have been made on the faith of his acceptance of the trust, and a refusal after the death of the testator to give effect to it would be a fraud on the part of the legatee'' and the same principle applies where the fact that the gift itself is upon trust is mentioned in the will Parol evidence is therefore admissible to prove the terms of the trust.

In re Fleetwood, (1880) 15 Ch.D 594 followed.

JOTTINGS AND CUTTINGS.

Reclaimable and Irreclaimable Offenders.—A letter appeared in *The Times* of the 20th instant in which the writer, Sir Arthur Conan Doyle, advocated for the "irreclaimable criminal" perpetual segregation in an institution akin to a criminal lunatic asylum, and instanced the recent case of an offender who, on being sentenced to imprisonment, sent up a note to the judge saying that he had no intention of reforming. The letter concluded: "It seems to me that if a man has been convicted three or four times of a penal offence he is a fit candidate for such a perpetual asylum." In view of this letter and the considerable and useful correspondence on the subject of hardened offenders which it has evoked, interest attaches to the meeting of the Central Discharged Prisoners' Aid Society, of which a report appeared, *ante,* p. 528. That there was unfortunately a certain residuum of hopeless cases amongst discharged prisoners all speakers were agreed, but they were equally unanimous that the number of such irreclaimable cases was relatively small The fact rightly referred to by Mr. Justice McCardie as both grave and important, that about 10 per cent. of the committals to prison were of persons under twenty-one years of age, confirms his argument that, were it from no higher motive than prudence on the part of society herself, everything should be done to convert this social liability into a useful social asset and to mitigate the ostracism which naturally tends to turn offenders into confirmed and hardened criminals While work of this importance is in the hands of a voluntary organisation an important factor in its success is, of course, bound to be its financial resources, which, unfortunately, are not too plentiful.—*L.T.*, 1929, p. 541.

Caricatures as Advertisements—Last Monday a jury returned a verdict for the plaintiff and assessed the damages at £1,000 in the case of *Tolley* v. *J. S. Fry and Sons, Limited.* The plaintiff is the amateur golf champion, and the defendants, the well-known chocolate manufacturers, had published a caricature of the plaintiff with a comparative diminutive caddy, and the following limerick printed below it:

"The caddy to Tolley said: 'Oh, Sir!
Good shot, Sir, that ball see it go, Sir
My word, how it flies
Like a cartet of Fry's.
They're handy, they're good and priced low, Sir."

The plaintiff admitted that his size was the one thing about him which could be caricatured, but he did not complain seriously about the caricature nor about the quality of the poem published with it, his only remark on this score being that it was not a particularly good swing nor did he think it a very good limerick. The innuendo he relied on, put shortly, was that he had consented for gain to prostitute his reputation as a golfer and had thereby been guilty of conduct unworthy of his status as an amateur. An imputation on a golfer's amateur status was, he contended, likely to prevent him from playing in the amateur championship. Three out of the four caricatures which had preceded his were those of Cabinet Ministers, but Cabinet Ministers he regarded as professionals. Mr. Tolley had, of course, received no payment whatever in respect of the advertisement, and had been ignorant of the preparation of the cartoon until it appeared in very many newspapers and journals. Mr. Justice McCardie said in a recent case that "the words complained of must be such as would injure the plaintiff's reputation in the minds of ordinary, just and reasonable citizens." We cannot imagine any such thinking the less of Mr. Cyril Tolley after seeing the caricature in question, but we think the practice of using caricatures in connection with trade without the consent of the originals highly objectionable, quite apart from any question of defamation, and one which might even engage the attention of the legislature.—*L.T.*, 1929, p. 44.

Publication to Wife of Person Defamed.—The Court of Appeal have ordered a new trial in the case of *Watt* v. *Longsdon,* in which the defendant had communicated to the plaintiff's wife information as to the plaintiff's infidelity which he had after-

wards had to admit was untrue. The defendant stated that he and his family and the plaintiff's wife were on such close terms of friendship that it was his duty to assist and warn her in the circumstances. Mr. Justice Horridge seems to have inclined to the view that if a person had such an obvious interest as to make him or her a proper recipient of a statement it was not necessary that the person making the statement should be under any moral or social duty so to do. The Court of Appeal did not agree with this view. Lord Justice Scrutton, on the existence of a duty to communicate in cases of this kind, said that it was impossible to say that a stranger or friend was always under a moral or social duty to communicate to a husband or wife news of the character in question. It was equally impossible to say that he was never under such a duty. It must depend on the circumstances of each case. It could not be the duty even of a friend to communicate all the gossip the friend heard at men's clubs or women's bridge parties. Using the best judgment he could in a difficult matter, he had come to the conclusion that there had been no duty to communicate in the case in question. Having regard to the tragic effect which the mere shadow of suspicion may have on the closest human relationship, we think that what may present itself as a moral or social duty should be scrutinised with meticulous care and more often honoured in the breach than in the observance, and this may limit the scope of the duty and so affect the legal position.—*L.T.*, 1929, p. 64.

Novelists and their Law.—To most of us the creations evolved from the imagination of the great novelists possess a reality and verisimilitude entirely absent in many cases from the grave pages of the biographer and historian. Lawyers, whom Thackeray described as notorious novel-readers, find in the pages of their favourite writers of fiction not only a personal, but also a professional enjoyment, when, as often happens, legal problems and situations are discussed and described. Quite recently, it will be remembered, Professor Holdsworth gave us an entrancing book on the law and lawyers of Dickens, bringing into clear relief the accuracy of that distinguished novelist when handling legal problems, or picturing legal scenes. The late Sir John Rankine, for many years the occupant of the chair of Scots law in the University of Edinburgh, found an intensity of enjoyment during his last years in noting and commenting upon the legal aspects of Sir Walter Scott's novels, which more than once were quoted on the Scottish Bench as accurate

transcripts of northern jurisprudence. Scott, naturally, knew the law of his country with an intimacy possessed by few others, and was able to utilise with striking effect those features which lent themselves to picturesque treatment. Another novelist of a past day who recognised the value of legal topics in the development of her stories was George Eliot. In "Felix Holt," she introduced an abstruse point of real property law, but knowing its difficulty, had the good sense to consult the late Mr. Frederic Harrison, who, if we are not mistaken, wrote the "opinion," which appears in the novel, the problem having been worked out by him in consultation with Mr. (afterwards Lord) Herschell, on the lines suggested by the novelist. There are not in the novels of Jane Austen—George Eliot's great predecessor in the ranks of lady writers—many questions of law mooted, but one at least has, during the past few days, been engaging attention in the correspondence columns of *The Times*—a problem in real property law—as to which several learned persons have been offering solutions. Lawyers owe much to our novelists, and on the other hand our novelists owe much to the law.—*S J.*, 1929, p. 209.

Mr. Justice Oliver Wendell Holmes.—Like many of our English judges, Mr. Justice Oliver Wendell Holmes—honoured son of honoured sire—appears to possess the secret of longevity, and with it all the intellectual alertness that has marked his career from its beginning. Few can boast a judicial experience extending over so many years as Mr. Justice Holmes. Appointed to the Supreme Court of Massachusetts as far back as 1882, he was, seventeen years later, promoted to the office of chief justice of that tribunal; and three years thereafter he exchanged that position for the still higher dignity of Associate Justice of the Supreme Court of the United States, the duties of which he continues to discharge with his accustomed vigour, despite the fact that recently he celebrated his eighty-eighth birthday; and his judgments are, as they always have been, couched in classical English and graced with that great learning which he long ago taught us to know and admire in his classic volume on "The Common Law." He can claim forty-seven years of continuous judicial service, and the claim must surely be unique in the annals of the law. Not only in law, but also in arms has he gained distinction. It seems almost incredible, but it is nevertheless the fact, that he saw active service in the Civil War, and was seriously wounded four or five times,

returning to service again each time as soon as the doctors allowed him. No wonder that his father, as appears from a letter reproduced in the current issue of the *American Bar Association Journal,* was proud of his son—"his boy" he calls him—who stood over six feet in his military shoes. An admirable portrait of the distinguished judicial veteran which many of his admirers in England will be glad to see, is given in the same number of the *Journal.—S.J.,* 1929, p. 225.

Law Reports with Editorial Comments.—Some little time ago the "Dominion Law Reports", published weekly, and giving all the Imperial, Dominion and Provincial case law of Canada, introduced, and continue to furnish, a somewhat novel feature, namely, an editorial comment on the most important cases appearing in each issue It is, of course, no new thing to have selections from our case law presented to us with learned annotations, as, for example, in "Smith's Leading Cases," and other collections on the same lines; but till now it has not been usual for a volume of contemporary reports to be issued accompanied by comments on the cases it contains Although somewhat novel, the idea is none the less excellent. All reports are not of uniform interest; indeed, some of them, by reason of their subject-matter, are so dull as to be actually repellant to the average practitioner who may therefore be pardoned if, not unfrequently, he carries the art of skipping to its utmost limit. A note to such cases may helpfully point out their importance if not their charm. Other cases, again, while not of this class, may be made more valuable by a note pointing out their relation to previous decisions. So there is much to be said in favour of the plan adopted by our Canadian confréres of prefixing to each number of their reports short comments on the cases included. It means, of course, a good deal of extra work for the editor, who has usually quite enough to do in seeing that the reports are accurate and equipped with all the necessary references, without having also to write notes on the individual cases, but if it can be done—and apparently the editor of the "Dominion Law Reports" finds it possible to do it—there is no doubt that it will appeal to his subscribers and prove to be of general utility.—*S J.,* 1929, p 241.

The Foreign Office and the World Court.—In a strong, but not too strong, letter to the *Daily Telegraph* a few days ago, Professor J. H. Morgan, K.C, the distinguished authority on

constitutional and international law, protests against the proposed nomination by the Foreign Office of its legal adviser to fill the vacancy in the Permanent Court of International Justice at The Hague created by the lamented death of Lord Finlay. No one, we suppose, would venture to criticise the work that has for many years been done by the present legal adviser to the Foreign Office, but his undoubted competency for the post which he at present holds does not warrant the conclusion that he would be equally qualified to fill the position to which it is proposed to exalt him The Permanent Court of International Justice is a tribunal of a very special character, in which it is imperative not only that each member should be a jurist of wide knowledge, but likewise that he should be a person who has had the training of a judge, accustomed to regard the problems which came before him unhampered by views acquired in government service. The bureaucratic tendencies of which we have heard so much in recent years will not, we venture to hope, be carried to the extent of promoting a civil servant, however distinguished in his own sphere, into the high position of a judge in the most remarkable tribunal the world has ever known, especially when there are so many eminent judges and ex-judges from among whom a selection could be made that would command universal approval. Professor Morgan has done a public service in calling attention so pointedly to the subject, and we trust that his protest will have the desired effect—*S.J.*, 1929, p. 257.

A Vote for a Company—The vote, originally an exclusively masculine privilege, and now common to either sex, is still denied to the sexless company, which of course is nevertheless subject to taxation. In constituencies like Poplar, where most of the rates and taxes appear to be paid by limited companies or other statutory corporations, their boards are reported to feel, perhaps naturally, some grievance about such a state of affairs. In two recent instances at Finsbury an attempt has been made to rectify that grievance, and the issue has materialised in separate cases brought as tests before the Court of Appeal. Directors of two limited companies applied for registration of their votes in respect of tenancy agreements with them for rooms as business premises at the offices of the companies. The registration officer allowed the claims, which were sustained on appeal by the county court judge. Mr. A J. Frost, a member of the Finsbury Borough Council, appealed to the Court of

Appeal, presumably under S. 14 (2) of the Representation of the People Act, 1918, which provides for an appeal to that court, but not further. The Court of Appeal, Scrutton, L.J., dissenting in the first case, have upheld the decision of the county court judge, so the law is laid down subject only to alteration by Parliament. In the first case, that of a Mr. Caslon, his business was admittedly that of the company which employed him only, though he wrote a few private letters at his desk. In the second case a Mr. Wilkin claimed to carry on some independent business of his own, in addition to his services to the company which was his landlord. Scrutton, L.J., held that Mr. Caslon carried on the business of the company, and not his own "business, profession or trade within S. 1 (3) of the Act." He also said there was material to find that the tenancy agreement was merely colourable, though for the purposes of his judgment he followed the court below, and treated it as genuine. The other judges held that Mr. Caslon was conducting his own business and none the less so as a servant of the company. In effect his business was the company's business. All the judges held, following decisions on the Rent Restriction Acts, that a room was "premises." "Occupation" has of course been held to mean exclusive occupation under the Act of 1832: see *Downing* v. *Luckett*, (1847) 5 C.B. 40 (though of course there might be exclusive occupation by joint tenants). This would mean that the tenant would have the right to lock out even the superior officers of the company, and therefore the office boy's stool would not qualify him for a vote. In *Mackay* v. *McGuire*, (1891) 1 Ch. 250, it was held that a tenancy at will qualified for the franchise. It is of course unnecessary to add that a board of directors could not dictate to their tenant the way he should vote, though they might have a shrewd idea of his political views before they conceded him his tenancy agreement.—*S.J.*, 1929, p. 258.

The Right of Sterilisation.—A remarkable passage in the hearing of an otherwise commonplace charge of drunkenness and assault is reported from Old-street police station. The prisoner was a young man, and a representative from the London County Council had seen him, and was prepared to make an order concerning him under the Mental Deficiency Act, 1913. The county council was also prepared to place him in an institution. Mr. Jenkins, who defended, appealed that he might be set at liberty, that being the wish of his relatives. Mr. Clarke

Hall demurred on the ground that, if free, he might become the father of other mental defectives The prisoner's brother assured the magistrate that he would not marry, to which Mr. Clarke Hall objected that, nevertheless, he might have children. Mr. Jenkins is reported to have asked the brother if he was prepared to have the prisoner "medically treated." The brother is reported to have assented, and Dr. Williams, medical officer to the London County Council, to have observed that "it would be rather a new process in this country." If the conversation occurred as reported, comment may be made that, assuming "medically treated" meant "rendered incapable of procreation by operation,'' Dr. Williams understated the matter. There need be no hesitation in stating that such a process would be an illegal operation, and even discussion of it in a court of law as a practicable course appears surprising. It is understood, no doubt, that the operation in question is not the barbarity inflicted by jealous medieval husbands on guilty lovers, and even now used for various reasons in the East, but a minor one, entailing a minimum of pain and discomfort, and no appreciable after-effects, other than that desired—in attaining which, presumably, it is as effective as the older method. A doctor who performed this operation on a person mentally incapable of giving assent would at the very least be guilty of a serious assault or unlawful wounding. It may also be laid down with some confidence that, even in the case of a person capable of giving assent and doing so, the operation would amount to assault in a country where the law forbids consent to that minor form of battery, with temporary instead of permanent result, known as the "knock-out." Whether the person consenting would be guilty of "self-mayhem" is perhaps an academic question, but it may be suggested that the Sovereign is entitled to rely on his subjects to ensure their continuance—indeed, they only can bring about that result. Whether the law should be changed in respect of mental defectives, and perhaps criminals, etc., is, of course, a highly controversial matter, which Mr. Neville Chamberlain has wisely postponed until after the election. It is understood that some American States are trying the experiment of sterilising the alleged unfit, perhaps spurred thereto by the criminal and medical history of the ill-starred Jukes family. Sterilisation is, of course, as irrevocable in its way as hanging, and the definition of unfitness an extremely difficult matter. Such an experiment, therefore, is certainly not one to be adopted in haste.—*S.J.*, 1929, p. 258.

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Gretna Green Marriages.—The prominence given in the lay press to a recent marriage at Gretna Green and the comments made thereon, show that in some quarters a good deal of misconception still prevails regarding irregular marriages in Scotland. First of all it should be observed that there is no peculiar sanctity attaching to a marriage contracted at the village of Gretna Green, whose fame, or notoriety, perhaps we should say, dates from the days before Lord Brougham's Act of 1856, when, owing to its proximity to the border, it was one of the first villages accessible to English runaway couples desirous of a speedy wedding. At the time there was no necessity for either of the intended spouses having been resident in Scotland; this, however, was altered by the statute of 1856, which by S. 1 enacts that "after 31st December, 1856, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage; any law, custom or usage to the contrary notwithstanding." The computation of the twenty-one days' residence is strict, as is shown by the decision of Sir James Hannen in *Lawford* v. *Davies,* (1878) 4 P. D. 61. There a man and a woman, both of whom were domiciled in England, arrived in Scotland about 4 a.m. on 1st July, 1870, remained there until 21st July, and between 11 and 12 a.m. on that day contracted in Edinburgh an irregular marriage. It was held that the marriage was invalid as they had not "lived in Scotland for twenty-one days next preceding such marriage". An irregular marriage as explained by Mr. F. P. Walton in his "Handbook of Husband and Wife according to the Law of Scotland," is one contracted without any religious ceremony, by the parties declaring that they accept each other for husband and wife. The church has always frowned upon this method of entry into the matrimonial state, but there is no doubt of its validity provided there is a *bona fide* acceptance of each other by the parties for husband and wife, and provided, as we have seen, the requisite residential qualification is fulfilled. Such a marriage may be validly entered into at any place in Scotland, Gretna Green having no monopoly in this matter.—*S.J.*, 1929, p. 274.

Mr. Justice Hughes and the World Court.—One of the most interesting features of the current issue of the *American Bar Association Journal* is the tribute paid by distinguished

American lawyers to Mr. Justice Hughes on the eve of his sailing for Europe to take up his duties as a member of the Permanent Court of International Justice, a post for which his training as a former judge of the United States Supreme Court, and as a former Secretary of State, pre-eminently fits him. No one present in Westminster Hall some years ago, when the English and Canadian Bars welcomed their brethren from the United States, will ever forget the impression made by Mr. Hughes by his magnificent oration and the tribute he paid to the civilising influence of English law throughout the world. For his new work no worthier representative of his country could have been chosen; so said Mr. John W. Davies, the former Ambassador to Great Britain; while Mr. George W. Wickersham, a former Attorney-General of the United States, declares this appointment to be but the beginning of a new and enlarged opportunity for distinguished service. In the *Journal*, there is an excellent portrait of Mr. Hughes as well as the reproduction of a photograph, taken, it is true some time ago, of the judges of the Hague Court, included in the group being the late Lord Finlay and the late Mr. Andre Weiss, who represented France. As we ventured to urge in a recent issue, it is to be hoped that the successor of Lord Finlay will have judicial qualifications equal to his, and we would now add, equal to those of the great lawyer whom the United States has chosen as her representative.—*S.J.*, 1929, p. 289.

Enthusiasm for the Law—While it is true that the generality of men exhibit much more enthusiasm for their hobbies than for their ordinary avocations, there are others who make a hobby of their work and throw into it, and extract from it, that intensity of enjoyment which the majority of their fellows show only for golf or cricket or fishing, or other sport. In the law there have been a few of such enthusiasts who have found their chief delight in its study or exposition. In this select band may certainly be included Baron Parke, who is reported to have taken, on one occasion, a "beautiful demurrer" to the bedside of a sick friend to cheer him in his illness; in various other ways, too, he showed his passion for the law. Akin, surely, to the Baron was the old conveyancer of whom mention is made by Lord Campbell in one of those biographical volumes which make fascinating reading, but which, as was said by Sir Charles Wetherell, had added a new terror to death. The old conveyancer obviously loved his work, for, when asked whether he did not find

it extremely irksome to spend his days poring over abstracts of title, conveyances and mortgages, admitted that sometimes he did find it wearisome, but, he added, with a glow of enthusiasm, that every now and then he was cheered by coming across "a brilliant deed." Happily the race of legal enthusiasts is not extinct even in these prosaic days. In the syllabus of his course of lectures to be delivered at the School of Economics on the value of judicial records as an aid to the study of legal and economic history, Mr. Hubert Hall speaks of "the lure of the plea rolls" and other matters which to him, at all events—and we trust to many others also—have a fascination and charm which it is pleasant to note. Law is too frequently reputed to be "harsh and crabbed," whereas, to those who woo her aright, it may be "a perpetual feast of nectar'd sweets."—*S.J.*, 1929, p. 305.

Lawyers in Parliament.—England once had a *parliamentum indoctum*, the unlearned Parliament as it was popularly called because of the exclusion from it of all lawyers. This was a long time ago—in 1404 to be precise—and the experiment has never been repeated, from which we may conclude that this ostracism of the legal profession was not the success that was anticipated. Nowadays there is invariably in each House of Commons a large infusion of lawyers. Taking *The Times* list, we find that in the newly elected House there are something like sixty members of the Bar, and fourteen members of the solicitors' branch. Such a preponderance of the legal element in the legislature has frequently given rise to reflections of a caustic character from critics whose charity of thought is not their chief endowment. That some lawyers may have been actuated by mercenary motives in seeking election may be conceded, but those are in a decided minority; the bulk of them, like those from other callings who have sought the suffrages of the constituencies, have been animated by the honest desire to serve their country and its interests by placing their knowledge at its service. There is ample scope for the work of lawyers in Parliament; they can help to improve the draftsmanship of statutes and, what is even more important, they can direct reasoned protests against the encroachments of bureaucracy More than the lay members, they know the subtle dangers which bureaucracy threatens to the liberty of the subject Let our legal representatives in the House of Commons be vigilant in this matter, and the public will realise the advantage of having trained observers safeguarding their interests.—*S.J.*, 1929, p. 373.

Litigation as a Luxury.—In a case at Watford, Judge Crawford is reported to have made strong comment on the folly of a young man who had a wife and three children, and only earned £3 a week, indulging in litigation. After hearing that he "instructed counsel" (no doubt the reporter's way of stating that the solicitor did so on his client's authority and behalf), the judge is represented as observing: "You have no more right to instruct counsel than I have to live in Grosvenor Square". No doubt it is unwise for any person of narrow means to indulge in frivolous or vexatious litigation. If the judge is correctly reported, however, his argument is a dangerous one. The courts of law are vital parts of the machinery for redressing injustice, and it would be very unfortunate indeed if a judge in effect said to a poor man: "You have no business to seek justice, for you cannot afford it". Possibly the young man's claim (or defence—the report is by no means clear) was untenable. In such case, however, one would expect the judge to scold, not the actual litigant, but the solicitor who assisted him to bring an unsound case into court, and the barrister who advised such a course. A man who finds himself badly off under a particular social system, and is then told that justice is too expensive for him, may become the raw material of a Bolshevist. The problem of the cost of justice is, of course, one ever present in a civilised country, and the large class of which the litigant in question was a member, namely, that just outside the official class of "poor persons," may be a special source of anxiety, for "*Dives*" has no grades. When there is medical need, the very poor use the hospitals without payment, and fees for those who can afford them are graduated, roughly it may be, but a millionaire would expect to pay more than a mechanic. The absence of proper relief in legal costs to the classes just below income-tax level (for the rare extension of Ord. 16, r. 22 (2) or (3), hardly seems sufficient) may be regarded as a defect in our system, not to say a justification for that much-abused individual the "speculative solicitor".—*S.J.*, 1929, p. 374.

No Arranged Divorces.—In a case recently before the Divorce Court, where the preliminary conversations between the spouses were revealed, as one may suppose, rather more fully than in some others, Lord Merrivale is reported to have observed, "Divorce by pre-conceived arrangement is impossible under English law. Divorce by consent is almost impossible. It is quite plain that this was a pre-concerted arrangement." The

distinction between the impossible pre-conceived arrangement and almost impossible consent might, perhaps, have been elaborated more fully, but his lordship no doubt correctly set forth the theory of English law. That being so, however, it seems unfortunate that, not only is there a very prevalent opinion among the public that the exact opposite is the case in practice, but that various successful petitioners have actually boasted that they have arranged for divorce with their spouses. And, further, some of them have even boasted of successful conspiracy to deceive the court, spending a few hours of night in an hotel bedroom with a woman unknown, in order that the judge might infer the moral offence essential for divorce, but which did not actually take place. Indeed, one successful play was based on the thesis that respectable middle-aged women will arrange for a consideration to play the part of enchantress in a conventional hotel bill divorce drama. Certainly, the unknown woman is so completely out of the ken of the court in the ordinary case that she might be the petitioner's grandmother, if of sufficiently youthful appearance for the part—and modern grandmothers specialise in youthfulness. "You can smell collusion," said Mr. Justice Bargrave Deane, in his evidence to the Royal Commission on Divorce. The smell, however, is not evidence. And if an unquestioned lady comes to a respectable solicitor, with the hotel bill in her hand, and assures him that no one is more surprised and distressed than herself at the contretemps, what else can he suppose than that she speaks the truth, the whole truth, and nothing but the truth, and would not for worlds deceive the august Court which she invokes to right her grievous wrong?—*S.J.*, 1929, p. 391.

King's Proctor's Dilemma.—Of late years there has been an ever increasing number of what are known in the Divorce Court as "discretion" cases, in which a petitioner for dissolution of marriage prays the court to forgive his or her own matrimonial lapse. These cases constitute a considerable portion of the so-called defended lists, and the unfettered discretion conferred by statute upon the Divorce Court has resulted, especially since the war, in divorce judges tempering mercy with justice in unbounded measure. But there is a particular aspect of this exercise of judicial discretion which is giving the King's Proctor's department much food for thought. It often happens, especially in these days of divorce on assize where many of the

King's Bench judges have not been trained in the pitfalls and peculiarities of the matrimonial jurisdiction, that a petitioner either through ignorance of the requirements of the law or of deliberate intent, fails to disclose his or her own lapse, and secures a decree *nisi*, without the court's being placed in possession of such a material fact. The King's Proctor's suspicions are aroused, either by kind friends or other means, and after a careful and expensive inquiry he discovers the facts, and enters a plea to show cause why the decree should be rescinded. The petitioner admits his fault and his reticence, and asks the court, notwithstanding, to exercise its discretion. In a good many cases recently the court has exercised its discretion in this way, letting the decree stand, but condemning the petitioner in the costs of the King's Proctor. Often, however, the petitioner has sued as a poor person, or is so poor that these costs cannot be recovered, and this term at least two of the divorce judges have called a halt to this procedure by rescinding the decree *nisi*. As regards the general principles of the exercise of the judicial discretion, the President, Lord Merrivale, in a recent case in which both spouses had lived each with another person in a *quasi*-conjugal manner for a number of years, adjourned the petition and called upon the King's Proctor to present his view of the matter. When this case comes up again for argument there can be little doubt that an attempt will be made to lay down some more definite limits for the exercise of the court's discretion than exist at present.—*S.J.*, 1929, p. 392.

Macnaghten, J., and Matrimonial Values.—Meanwhile Macnaghten, J., who is not to be caught napping on a point of law or legal procedure, has distinguished himself in a divorce case at Liverpool Assizes, where he refused to accept the inflated estimate by a jury of the value of a wife The wronged husband had put her value at 250*l*. and claimed that amount. The jury awarded 1,500*l*. damages against the co-respondent; but the judge refused to allow the amount claimed in the petition to be amended. Clearly he was right in so refusing, and particularly so as the reason given for the application to amend appears to have been only this: that the petitioner was unaware of the wealth of the co-respondent. The value of any commodity does not vary according to the financial position of the purchaser; and it has been laid down time and again that a wife's worth to her husband is to be assessed in currency on a cold and calculated estimate of her actual value.

The jury's finding will no doubt operate to induce future husband petitioners to think more highly of their errant spouses. —*L.J.*, 1929, p. 474.

Forensic Fat.—Since the passing of the Murphys and of Mr. Solomon Ford the English Bar is remarkably deficient in fat and in the kind of humour which goes therewith. Curtis Bennett, on festive occasions, has made fun of his own rotundity, but he is not to be compared with the corpulent giants of the past.

Sir Nicholas Bacon, Lord Keeper, was a rare specimen, and the only holder of the Great Seal to whose vast proportions the attention of posterity has been emphatically called. He had much wisdom, according to Fuller, *"in corpore crasso,"* and Camden refers to him as *"vir præpinguis ingenio accerrimo."* Not only his peers, but Queen Elizabeth herself, made merry over his fatness. She observed that "his soul lodged well." He, like our own Murphys and Curtis Bennett, was able to see the humour of his girth, and his letters contain many references to his infirmity.

Towards the close of his life it became the practice of the Bar to hold up their opening observations until he had tapped three times on the floor after taking his seat on the Bench. The signal was an intimation that he had recovered his breath and was ready to begin.—*L.J.*, 1929, p. 474.

The Cost of Litigation.—It may be true, as Lord Lyndhurst said, that "cheap law does not always mean cheap justice," but it is undeniable that dear law means injustice; and the cost of even the most trivial litigation at the present day is such as to close the Courts to a large and increasing proportion of His Majesty's subjects." So says Mr. C. H. S. Fifoot at the beginning of an article in the current *Fortnightly Review* on "The Cost of Litigation." Mr. Fifoot is a law tutor at Oxford and may be thought to be remote from the practical side of this ever-present question, but he supports his theme from the Law Reports and from a County Court case within his personal knowledge. From the Reports he takes the very curious case of *Kasler* v. *Slavouski* (1928, 1 K.B. 78), where a claim in respect of damage for defective goods was thrown back through three successive intermediate tradesmen on to the original seller The damages were 67*l.*, but A. had to pay this sum and accumulated costs amounting to 622*l.* In the County Court action the unsuccessful plaintiff in a motor accident case owed his own

solicitor 65*l.*, and had to pay the defendant's costs amounting to 72*l.* 17*s.* 6*d.* Of the latter sum counsel had seven guineas and the solicitor 6*l.* profit charges. The balance chiefly went to witnesses. These things are familiar, and they prompt the frequent advice to keep out of litigation. Mr. Fifoot recognises this, but of course it does not meet his aim, which is to secure the reduction of costs. The abolition of the House of Lords—a suggestion which had finally to be omitted from the Judicature Acts—would not go far, and Mr. Fifoot's practical proposals are the establishment of Sir Edward Parry's Conciliation Courts, the simplification of procedure in Divorce and Workmen's Compensation, and the replacing of the Law Society's system of Poor Persons assistance by the institution of a Government Department for the like purpose. The last is neither likely nor desirable, and none of the proposals touch the real question: Is it practicable to reduce the costs of litigation? Most practitioners probably will say the answer, save for possible reforms of procedure, is in the negative. And it is only such reforms that afford any hope.—*L.J.*, 1929, p. 19.

A Reforming Chancellor.—Reforms are the least of things we should expect from a Socialist Government or a Labour Lord Chancellor; and that is why the Lord Chancellor's remarks at the Lord Mayor's dinner to His Majesty's Judges was scanned with eager curiosity by all those who look to the law for their livelihood. The fears of those who may have anticipated some hint of a legal revolution were not only allayed, they were replaced by hope and pleasurable anticipation for the future.

He boldly recognised, as L.C., the two great evils, which, as Sankey, J. and L.J., he had from time to time criticised and denounced. Evils which not only affected the body politic and struck at the foundations of our constitutional liberties, but also tended to take bread from the mouths of lawyers, their wives and children. Practically every judge, jurist and constitutional lawyer has spoken in strong terms of these two matters; but it is the first time a member of the cabinet has committed himself in such unmistakable terms to the view that something must be done.

The giants to be attacked are these: (1) the increasing usurpation by Ministers and their Departments of the function of the judiciary; and (2) the antique procedure which places the private citizen at an unfair disadvantage in his disputes with the

Crown and its servants. Two fronts you will observe, but the same foe.—*L.J.*, 1929, p. 28.

Speech of the Lord Chancellor at the Lord Mayor's Banquet to the Judges.—The Lord Chancellor said:—My Lord Mayor, My Lords, Ladies and Gentlemen,—I thank you, Sir, for the kind manner in which you have proposed the toast of His Majesty's judges, and you, ladies and gentlemen, for the cordial way in which you have received it. Let me thank you too, Right Worshipful Sir, on behalf of my colleagues, for your kind welcome and your very delightful hospitality.

I am happy to be able to assure you, Sir, that the old reproach of the law's delays can no longer be laid to our charge, for all the divisions of the Court are well abreast of their work. There are no arrears. Indeed, the lists in the Court of Appeal are almost too forward, and but very few weeks elapse between a hearing in the Court of First Instance and a re-hearing up above.

The circuits are in the same happy position, and, although it is not always possible to prevent some loss of judicial time, great care should be taken not without reason to make any change in a system which has lasted so long and entered so successfully into the life and customs of our people. I should like to be allowed to mention here the great work which is done by the County Court Judges throughout England and Wales. The cases which have been entrusted to them, and are being more and more entrusted to them, are among the most important, and probably come nearer to the life and the homes of the great majority of our fellow-countrymen than even those which are tried in the High Court of Justice. I welcome this, my first opportunity, of pointing out and paying a tribute to the great services rendered to the cause of justice by my brethren of the County Court Bench.

A great deal has been heard lately of the cost of litigation, but something is to be said for not making law too cheap so as to prevent persons rushing to Court on the slightest provocation. To some extent the expense of litigation is caused by litigants themselves, who, quite rightly, like to have their cases properly presented—but those who employ fashionable advocates must be content to pay fashionable prices! It is not a bad thing that the fear of costs should deter vexatious litigation. I say, without fear of contradiction, that, from the most highly-placed

solicitor in the City or Lincoln's Inn to the most humble one who practises in some small provincial town, the majority endeavour to settle many more cases than they fight.

In speaking of this subject one cannot forget the vast amount of work done gratuitously by both branches of the profession in poor persons' cases. Under the new rules the work in this connection was decentralised, and over eighty committees, appointed by the Law Society in London and the provincial law societies, and approved by the Lord Chancellor, were set up. They enquire into the merits of cases, and, if satisfied, grant the applicant a certificate enabling him to proceed as a poor person. Solicitors and counsel of the very highest standing are enrolled on a voluntary rota to conduct the cases, and neither receive any remuneration for their work. It would appear that the problem of the poor person's lawyer in the High Court and the Court of Appeal is in the way of being satisfactorily settled by the devoted and self-denying efforts of the solicitors' branch of the profession. All honour to them. During the year 1928 poor person litigants in London alone received on judgment or by way of settlement over 10,000*l*.

The training of lawyers for both branches of the profession is a matter which cannot fail to interest those entrusted with the administration of justice. It is the duty of our generation to see that its successor has a proper supply of skilful and honourable advocates, and the problem of legal education is one which should engage the attention of all those who feel some responsibility for the future. This duty is discharged by the professors at our universities, by the Council of Legal Education and the Law Society, by the members of both branches of the profession who take students to read with them, and, may I add, by the judges, who are always ready to encourage the young advocate struggling with his first cases. We do not forget the dreadful occasions when we were in a similar position.

My Lord Mayor, the rule of law is the condition of liberty. Amid the cross-currents and shifting sands of public life the Law is like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the Law Courts, at any rate, he can get justice. Let the ambition of the lawyer be to serve the State and protect the rights of his fellow men. In a great commercial and industrial community like our own, the fulfilment of contracts and dispatch in the administration of the law are, as it were, part of our life-blood.

One of the most ancient codes teaches us to commend the man who sweareth unto his neighbour and disappointeth him not, though it be to his own hindrance. His Majesty's judges are charged with the administration of the law, but there are two matters relating to such administration which in recent years have caused some anxiety not only in the public mind, but among trained lawyers. The first is what has been described as a growing tendency to transfer decisions on points of law or fact from the Law Courts to the Minister of some Government department. The second is the general position of the subject when engaged in a dispute with the Crown, or an individual when engaged in a dispute with a Department of State. This is neither the time nor the place at which I should pronounce any definite view on either of these points, but I think that there is a general agreement both within and without the profession that these matters require further careful investigation. And it would be a source of satisfaction to me if it were found possible while I hold office to initiate and complete such an investigation, and to allay the anxiety which no doubt prevails in the public mind with regard to them. Another matter to which public attention should be called is the authority conferred upon a minister to implement Acts of Parliament by regulation. This is not a modern practice, but one the increase of which in recent years should not be lost sight of.

In the administration of justice judges are assisted by two necessary and powerful allies—the Bar and the Press. So long as we continue, please God, to have a fearless Judiciary, a vigilant Bar, and a pure and responsible Press, so long will justice be administered properly and to the general satisfaction. In an Empire such as ours, comprising men of all sorts and conditions, of varying creeds and various races in different stages of development, the proper administration of the law, whether here at the heart or in some remote outpost of our civilisation, is of supreme and vital importance. British love of justice, British respect for order, British desire for peace—that is the goal upon which I would have us set our eyes—those are the delectable mountains whose heights it is worth while to capture. That achieved, the memory of our Empire will endure when its triumphs have become an empty name.—*L.J.*, 1929, p. 31.

"To make the Punishment fit the Crime."—"We have said again and again, and we now repeat, that in sentencing a prisoner

regard *must* be had to the intrinsic nature of the offence. It is all wrong to send a man to a long term of penal servitude because at some other time for some other offence he has received heavy punishment."

That observation was made, says *The Times*, by the Lord Chief Justice (Lord Hewart) in giving judgment in the Court of Criminal Appeal reducing to nine months' imprisonment with hard labour a sentence of five years' penal servitude passed at Staffordshire Quarter Sessions on Alfred Thomas Woodward. Woodward, who had been previously convicted six times, had pleaded "Guilty" to obtaining by false pretences several small sums of money, amounting in the aggregate to 5*l.* 0*s.* 6*d.*

In the case of John Henry Smith, 21 years old, who also appealed from Staffordshire Quarter Sessions, the Court described as "quite excessive'' a sentence of two years' imprisonment with hard labour passed on him for shopbreaking and larceny of a trivial amount. In reducing that sentence, also to nine months' imprisonment with hard labour, the Lord Chief Justice said that the remarks which he had made in Woodward's case were equally applicable. Regard *must* be had to the intrinsic gravity of the offence. Smith's previous convictions were for minor offences, such as sleeping out.—*L.J.*, 1929, p. 34.

Irish Privy Council Appeals.—It is known that the Irish Free State Government desires to abolish the right of appeal to the Privy Council. That was made clear four years ago at the time when the Irish Land Act, 1922, was amended so as to overrule *Lynham* v. *Butler*. In the debate in the House of Lords on that occasion it was pointed out that the appeal, which is preserved by Art. 66 of the Constitution, could be got rid of only by Act of the Imperial Parliament; but Lord Cave and Lord Haldane both admitted that there was no constitutional objection to overruling retrospectively a particular decision of the Courts, though a repeated overruling, so as in effect to make appeals futile, would be a different matter. The question has arisen again in connection with the Copyright (Preservation) Bill now before the Free State Legislature, on which we print this week a letter from Messrs. Syrett and Sons. Their clients, the Performing Right Society, obtained in 1927 from Johnston, J., an injunction against the Bray Urban District Council restraining the performance of certain music, the copyright in which was vested in the Society. The question was whether the

Copyright Act, 1911, applied in the Free State at the time of the alleged infringement. Mr. Justice Johnston held that it did, but the Supreme Court reversed his decision, holding that the Act ceased to apply when the Treaty between Great Britain and Ireland was sanctioned by the Irish Free State Agreement Act, 1922. Consequently there was after this Act—or, perhaps, after the making of the Treaty on December 6, 1921—no copyright in Ireland. This was not anticipated, for the Free State, assuming that the Act applied, passed the Commercial and Industrial Property (Protection) Act, 1927, by which the Act of 1911 was repealed and new copyright provisions introduced, with a saving for rights acquired before December 6, 1921. This, however, did not help the Society, since they had acquired their rights after that date. Hence the appeal to the Privy Council, for which special leave has been given, and which is now pending.—*L.J.*, 1929, p. 35.

Evidence in India.—A Templar, writing to me from the neighbourhood of Rawal Pindi, calls my attention to certain points of the Indian Law of Evidence, whereby plaintiffs, defendants and persons charged with criminal offences are incompetent witnesses in their own cause. His observation of the course of a number of criminal trials has led him to the conclusion that this rule operates greatly to the advantage of the guilty. The prisoner, as things are, may make a statement; and not improbably he will attribute the damning evidence against him to the artful contrivance of consipring members of a rival caste. A few questions in cross-examination would make all things plain; but the harrassed prosecutor longs in vain for the opportunity.

It would seem that the Indian Reformers might well direct their attention to this matter of the Law of Evidence; for the advantages of making the accused a competent witness are now universally acknowledged. It makes the conviction of the guilty more certain and, at the same time, increases the unlikelihood that an innocent person will be condemned.—*L.J.*, 1929, p. 46.

The Open Witness-Box.—In this country we had a hard fight and a long wait before the rule which still prevails as to the competence of witnesses in India was abolished. In 1828 the Forgery Act enabled the person whose name was forged to

be a competent witness, despite his interest in the case. But Lord Denman and his friends had been agitating for twenty years before Lord Denman's Act of 1843 was passed, rendering competent as witnesses all persons who had an interest in the trial, or who had been convicted of crime.

Some thirty Acts were passed thereafter, rendering parties to civil suits, and persons accused of different crimes competent to give evidence; but it was not until 1898 that Lord Halsbury's Act was passed, making the accused person in all criminal cases and the husband or wife of such accused person, competent, but not compellable witnesses, and setting forth the rules under which they might be examined.

It is not without interest to consider the opinion of the late Sir Harry Poland, that stout opponent of untried and risky innovation in legal matters, as expressed by him two years after the passing of the Act of Lord Halsbury: "I will only say," he remarked to a classroom of students, "that all the predictions of its opponents have been falsified, and that it works admirably........We have now, after many struggles, an open witness box, and the juries are at last left to determine the truth or falsehood of the evidence from whatever source it may come."—*L.J.*, 1929, p. 46.

A Tichborne Tragedy.—The Tichborne trial will for centuries yet provide a topic of mystery and amusement; and Orton achieved one of his objects, at least, for his name will always be connected with the Tichborne name and estates. Comment in the *Cornhill* article has shown that the personality of this Orton is still very much mysterious and alive.

I am reminded that at least one legal reputation was ruined by the case; at any rate, Dr. Kenealy, Orton's counsel, descended rapidly thereafter into the pit of failure. It was not, indeed, his conduct, unseemly though it was, during the course of the Tichborne trial which led to his being disbarred and disbenched. The action taken by the Benchers of his Inn, that is to say, Gray's Inn, was due to the violence of his language in attacking, as Editor of the *Englishman*, eminent Judges and members of the Bar.

The only effect of his attack on Cockburn, C.J., and Hawkins, Q.C., in open Court, was his exclusion from the Bar Mess of the Oxford Circuit.—*L.J.*, 1929, p. 46.

Dr. Kenealy and the Benchers.—But the Gods were driving him to his doom, and he was in that frame of mind which made the doom inevitable when, in the summer of 1874, his fellow-Benchers of Gray's Inn invited him to explain his conduct as Editor of *Englishman*. His wife wrote that he had a headache and could not appear. Thereafter it was moved by Manisty, Q.C., and seconded by Holkar, Q.C., "That Dr. Keanly, being Editor of the newspaper, is unfit to be a Master of the Bench of this Honourable Society," and "that the call of Dr. Kenealy to this Bench be hereby vacated."

But he recovered from his headache, and so far from repenting, carried on the unequal war in his unfortunate paper. "Wherever the English language is spoken," he wrote, "and this paper is read they (the Gray's Inn Benchers) will be spat upon by every lover of truth and justice." He professed to discover in the L.C.J. a striking resemblance to Scroggs and Jeffreys. In a word, he carried on. And the end came when, in 1875, his call to the Bar was vacated and he was expelled from the Society. Not long after his name was struck from the Queen's Counsel's list.—*L.J.*, 1929, p. 46.

Bowen's Rhyme.—This is part of the rhyme wherein Bowen, L.J., at a later date described the discursive irrelevance in which Serjeant Kenealy and the Chief indulged during the course of that memorable and protracted trial:—

Meanwhile, about us and afar,
  Again across the storm;
Kenealy and the Chief at War,
  Each in the best of form.
Of virtue, science, letters, truth,
  They talked till all was blue;
Of Paul de Kock, the bane of youth,
  Of Bamfield Moore Carew.
If fools are oftener fat or thin,
  Which first forget their tongue,
Why all tobacco mixed with gin
  Is poison to the young.
And, whether Fielding's better bred
  Or Sterne, so full of fun;
Poor Mathew sighed and shook his head,
  "The Will of God be done."

L.J., 1929, p. 46.

CONTEMPORARY LEGAL LITERATURE.

In a fairly long article contributed to THE HARVARD LAW REVIEW (February, 1929), Mr. Edmund M. Morgan discusses the "Rationale of Vicarious Admissions" and advances certain powerful arguments against the reception of those admissions except when they satisfy the test of trustworthiness. "The exclusionary rules of evidence are more intended to protect the party against whom the evidence is offered rather than "to operate as automatic eliminators of untrustworthy testimony." "Truth is the object of all trials,'' and the Courts receive admissions by a party as truth of the matters asserted in them as (1) it is not likely that he would make a statement less favourable to himself than the truth will warrant and (2) he cannot be heard to object that he was not under oath and had no opportunity to cross-examine himself. But different considerations arise when they are sought to be used against a third party. And the writer strongly denounces the use of them against third persons except when they satisfy the elements of trustworthiness.

The writer takes up the cases of admissions by agents, co-conspirators, principals and sureties, joint owners, joint obligors and privies in interest and points out how the courts have loosely drifted from the test of trustworthiness to extraneous considerations drawn from the substantive law and fallacious reasoning. For example (1) in the case of an agent, authority to do an act does not necessarily imply authority to talk about it. (2) To say that when an agent merely transmits information to his superior, it is as if the superior was speaking to himself is specious; (3) in the case of joint obligors, the only thing which one has authority to do for all is to discharge the obligation. But, to assert that the admissions of the co-obligor will be as worthy of consideration as those of any other omits all consideration of the chief reason for receiving personal admissions. (4) On the ground that under the substantive law, a subsequent purchaser stands in his predecessor's shoes, the predecessor's statements are admitted against the successor-in interest, which really means that he is compelled to vouch for the veracity of his predecessor. Since in most cases the ground of reception has been loosely stated, the Courts wandered about "in a bog of uncertainty," and testimony has often been received without the slightest guarantee of trustworthiness. The writer is alive to the considerations of expediency which have driven Courts to engraft these exceptions to the rule against admitting

hearsay evidence, but yet feels that, to admit those statements on grounds other than that of trustworthiness will be lamentable.

In Glanville v. *Sutton & Co.*,[1] the defendant's horse was harnessed to a van, the carman being at the time engaged on business at some neighbouring premises. The plaintiff who passed by in front of the horse's head was suddenly bit and injured. It was proved that to the defendant's knowledge it had on prior occasions bit other horses. It was held following *Nanton* v. *Brocklebank*,[2] that proof that the owner knew that his horse was dangerous to other horses did not make him liable in respect of another damage cause to man. The *Scienter* to be proved was the knowledge of the particular kind of damage caused. In a note on this case in the Law Journal, Vol. LXVII, p. 396, Mr. R. Denthorne refers to some leading cases on the subject. In the case of animals by nature wild, such as lions, tigers, etc., which though tamed are likely to return to their former ferocious habits, the owners of the animals keep them at their peril and the party injured can recover without proof of *Scienter* (*May* v. *Bundetth*).[3] But in the case of domestic animals, knowledge of their vicious propensities must be brought home to the owner either by prior instances or from the nature of the animal. If the horse is 'savage' (*Lowery* v. *Walker*),[4] or ungovernable or in the course of being 'broken in' (*Michell* v. *Allestry*)[5] or is accustomed to bite to the owner's knowledge (*Walker* v. *Hall*),[6] the owner is certainly liable, even though the injured man is at the time on the owner's land by his permission. In other cases the injured person is obliged to prove a clear case of negligence for, in the words of Pollock, C. B. in *Greenland* v. *Chaplin*[7] "a person is not expected to anticipate and guard against that which no reasonable man would expect to occur."

Definition of equity has always been and still is a burden to the classifier and the theorist and the Property Statutes of 1925, though simplifying the Equity Rules themselves has rendered the task of the theorist more onerous. The reason is not far to seek. The peculiar history of equity law which has developed various doctrines mutually almost unrelated to meet and neutralise several common law rules has been the main reason for this difficulty. It was with the chancellorship of Lord Nottingham

1. L.R. (1928) 1 K.B 571· 97 L.J. K.B 166
2 L.R. (1923) 2 K B. 212· 92 L.J.K B. 624.
3. 16 L.J.Q.B. 64. 4. (1911) A.C. 10 5 84 E R. 932.
6. (1876) 40 J.P. 456. 7. (1850) 19 L.J. Ex. 293.

that it formed itself into a stable system of rules and now as Mr. H. G. Hanbury points out in his illuminating article "Field of Modern Equity" in THE LAW QUARTERLY REVIEW (April, 1929), it is entering on an "artificial mechanical phase." It has assumed an important place in the Law of Property at the present day and that, the writer thinks, is largely due to the modern view that property should be capable of free and easy transfer.

Maitland postulates that in as much as every equity must yield to the overriding rights of the *bona fide* purchaser for value without notice of the legal estate, it can never be a *jus in rem*. Ames has said that it is the very keynote of equitable jurisdiction that "equity acts *in personam*". But the writer point out that such statements require some modification in view of *Sinclair* v. *Brougham*,[8] which treats the following of trust moneys by beneficiaries as a proceeding *in rem*. And it may now be more accurate to regard equitable rights and interests "as hybrids standing midway between *jura in personam* and *jura in rem*."

After pointing out in some detail the influence of equity on the law of contracts and traces of its "guiding hand" in the remedies for breach of contract, *viz.*, injunction, cancellation, rectification and specific performance and in the doctrine of part performance, the writer concludes this portion of the article with an approval of Maitland's dictum: "Equity has added to our legal system, together with a number of detached doctrines, one novel and fertile institution namely the trust, and three novel and fertile remedies namely specific performance, injunction and judicial administration of estates. Round these...... most of these equitable rules group themselves." The learned writer then considers some criticisms against equity as a subject for a text book and thinks there is still a place for a text book on general equity. Only, as a result of the Property Legislation, it may have to incorporate more of property law than before Property law has not made any revolution in the subject but as Sir Leslie Scott says it has effected an 'evolution'.

Maitland classifies trusts into those arising (1) by act of parties, and (2) by operation of law. The former is sub-divided into express and implied and the latter into resulting and constructive trusts. The classification, the writer says, is not wholly satisfactory It does not faithfully depict the real spirit

8. (1914) A.C. 398.

of the doctrine of trusts. *Keech* v. *Sanford*[9] may aptly be said to be the meeting place "for two kindred principles (1) that one to whose hands trust property comes with knowledge of the trust will be bound by the trust and (2) that one "who stands in a fiduciary relation to another ought not to be allowed to keep for himself a benefit gained from property which in conscience belongs to that other, but must hold that benefit for that other's account." The distinction between express and constructive trusts becomes material in the law of Limitations. *Soar* v. *Ashwell*[10] is an instructive decision and may serve as the basis of a new classification.

The writer concludes the article with an examination of the place in the modern system of such maxims of equity as (1) Equity Acts *in personam*. (2) Equity follows the law. (3) *Qui prior est tempore potior est jure* and (4) He who seeks equity must do equity. Though other maxims have their own place and can yet profitably continue to fill "the worthy place of co-adjutors to the study of equity jurisprudence," the last of the maxims above stated has come to acquire a special importance. The whole doctrine of set off rests on this maxim which for convenience the writer calls the rule in *Cherry* v. *Boultby*.[11]

Under the caption "Voluntary payment to a foreign administrator," Mr. Joseph H. Beale has contributed an article to THE HARVARD LAW REVIEW (March, 1929), wherein he discusses the American Law on the subject. On account of historical accidents, a distinction had been drawn in England between an executor and an administrator. Before Edward I, the executor was recognised as receiving from the dead man his entire estate in trust for the purposes of the gift The Ecclesiastical Court and later the Chancery and the King's Courts compelled the executor to carry out the trust and also upheld a writ of debt for and against executors. By later statutes the earlier executor was in effect made a universal successor, with this exception that personal torts still die with the deceased.

As it was considered by the Church a sin to die intestate, the Bishop took the goods of the intestate and after giving the wife and children their proper proportion, the remainder was taken for purposes conducive to the salvation of the intestate's soul. Later such work was shouldered by the ordinary and in

9 2 Wh. and Tred 648, 9th edn 10 (1893) 2 Q.B. 390.
11. (1839) 4 My. and Cr. 442.

1357, by 31 Edw. III. C. 11, it was deputed to "the next and most lawful friends of the dead." (Administrators). Like the executors, they had the right to sue and the liability to be sued for debts due to and by the estate.

In America this distinction has never been made. The only difference between them is that the executor is nominated by the testator whereas the administrator is appointed by the Court, with the result that where the executor dies further administration is carried on by an administrator with the will annexed. The writer examines in some detail the exceptional cases in which the distinction has been made in American Courts. All the cases are almost agreed in giving the administrator the right to collect in *his own state* a *chose in action* due to the deceased. The idea of the executor being regarded as a universal successor has not found favour with the American States. On the theory of the executor being a universal successor, it would be difficult to support the right of the ancillary administrator to collect choses in action within his own state as aganist the domiciliary administrator. Schouler states that "the administrator appointed at the domicil of the deceased owns all chattels and claims of the deceased everywhere while the ancillary administrator owns only those situated within his jurisdiction." This, the writer thinks, may be supportable as regards negotiable papers as, for purposes of administration they are treated like chattels. "The true view," the writer thinks, is "that neither the executor nor the administrator to-day gets any title to mere choses in action of the decedent." He only gets a right to collect them and this right like all other rights created by law extends no further than the boundaries of the state.

The writer next discusses some leading decisions bearing on the question under review. In his view, as a result of the decisions, a payment made to a foreign administrator would be a valid discharge of the debt if there were no local creditors or at the time no local administrator. But if there are local creditors, though no local administrator, it would not be a valid discharge. Also, the foreign administrator will not be allowed to sue for the debt, if it will have the effect of prejudicing the local creditors. The reason for these distinctions seems to lie in the assiduity with which each country protects its own citizens against the withdrawal into another country of assets on which they relied for payment of debts due to them.

(We may refer our readers to Dicey's "Conflict of Laws" Rule 131 (*u*) and Williams on Executors 11th Edn., pp. 1275 to 1280 for a learned discussion of the subject).

THE LAW JOURNAL (12th April, 1929) contains a short note headed "Aerial Trespass." In the last issue we had occasion to summarise two interesting articles on the subject from THE AMERICAN LAW REVIEW. In England, the matter is now covered by S. 9 of the Air Navigation Act, 1920 according to which no action will lie in respect of trespass or nuisance by reason only of the flight of aircraft over any property at a height above the ground which is reasonable or the ordinary incident of such flight, etc. The note extracts the views of Messrs. Pollock and Salmond on the question, the former inclining to the view that under the common law, it will constitute a trespass unless it can be said that the scope of possible trespass is limited by that of possible effective possession and the latter to the contrary view, *viz.*, that "mere entry into airspace is not an actionable wrong.".

BOOK REVIEWS.

QUESTIONED DOCUMENTS, by Albert S. Osborn. Second edition, 1929. Examiner of Questioned Documents with an Introduction by Prof. Wigmore. Published by Boyd Printing Company, Inc., Albany, New York. Sweet and Maxwell, Ltd. Price Rs. 41-4-0.

This is the second edition of a work whose first edition appeared about eighteen years ago and the passing of years has resulted in a thorough revision of the matter contained in the first edition and the addition of a vast deal of useful and new matter. It must be admitted that in this country the detection of spurious documents has not ordinarily rested upon a scientific consideration of the principles bearing upon questioned documents In some cases, Judges have gone further and held that expert testimony on questioned documents is of a very unsatisfactory character and not entitled to any high probative value. It may be that such views result from the circumstance that experts are brought in on both sides and give contrary opinions and the Judges themselves and lawyers are not familiar with the principles underlying a scientific investigation of the question. The present work presents the principles underlying

a scientific investigation and will be read with interest by lawyers and judges and we hope that they will be better able to discharge their every-day duties of finding out by scientific means whether the documents which are questioned are genuine or otherwise.

DONOGH'S INDIAN STAMP ACT, eighth edition. Revised by K. J. Rustomji, Bar.-at-Law, 1929 Published by Messrs. Butterworth & Co. Price Rs. 12.

Donogh's Stamp Law has held a leading place among the treatises on the subject for several years. Indeed its value has been recognised by the Government with the result that copies of the book have been supplied by the Government to various officers. It is fortunate that after the death of the author, Mr. Rustomji has undertaken the revision of the present and the last editions. The distinctive feature of the present edition is that the editor has incorporated opinions of leading writers on the English Stamp Law in their appropriate places. The English treatises are not easily available in the mofussil and the editor has done a distinct service in quoting from them wherever necessary. The most important legislative change introduced since the publication of the last edition is the one abolishing the stamp duties on cheques and demand drafts. This and other legislative changes have been noticed in the present edition and the case-law has been brought down to the end of 1928. The book will therefore retain its leading place among the treatises on the subject.

THE INDIAN COMPANY LAW, by Messrs. S. Parthasarathy Aiyangar, B.A., B.L., and V. K. Thiruvenkatachari, M.A., B.L., Advocates, Madras, 1929. Published by Messrs. Butterworth & Co. Price Rs. 12.

We welcome this work by two members of the Madras Bar whose names are already familiar as writers on legal topics. There are already some commentaries on the Indian Companies Act giving the annotations under the various sections. Such publications are not of much use to the businessman or even a beginner in the Company Law. To them a lucid statement of the leading principles of Indian Company Law under various chapters in their natural order will be of great advantage and this is the task which the learned authors have undertaken in the present work. They have also not embarrassed the reader by

innumerable citations of reported decisions. They have chosen only the leading decisions to illustrate the points dealt with. It may be admitted that a judicious selection of decisions illustrating the leading principles is a difficult one; and the authors have succeeded in selecting the cases which bring out the principles clearly. The chapters on auditors and the balance sheet contributed by Mr. Cole will be read with interest. The forms adapted from the English Company Practice will, we have no doubt, be found useful, and we believe that the value of the work will be appreciated by lawyers and businessmen. The get up and printing of the work leave nothing to be desired.

We are glad to acknowledge the receipt of the Madras Acts (Criminal), 1802-1927, Part 5 by Mr. P. Hari Rao, B.A., B.L., Advocate, High Court, Madras, published by T. A. Venkasami Rao.

We are glad to acknowledge the receipt of Parts 1 to 4 of Volume I of the Tamil All-India Law Journal.

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MURUGESA MUDALIAR *v.* DAVVA VENKATA KESAVULU CHETTY, (1929) 56 M.L.J. 649.

This case relates to a question of frequent occurrence and hence of considerable importance to mofussil practitioners. Shortly stated, the question is whether the High (or District) Court has power under the provisions of section 24 of the Code of Civil Procedure:

(*i*) to transfer a Small Cause suit to a Court which is not a "Small Cause Court" or a "Court invested with Small Cause powers," and

(*ii*) to transfer a Small Cause suit of greater value to a Court having a limited Small Cause jurisdiction.

The learned Judge (Anantakrishna Aiyar, J.) answered the above questions in the negative after a full discussion of the case-law bearing on the subject. The decision was chiefly influenced by the fact:

(*i*) that section 24, Civil Procedure Code, authorises a transfer only to a Court of "competent" jurisdiction, "competency" in this connection meaning "with reference to the nature and value of the subject-matter of the suit," and that a Court may not be competent either because of the valuation of the suit or because it had no Small Cause powers;

(*ii*) that an order of transfer passed under section 24 (4) cannot invest a Court with Small Cause jurisdiction

nor could such an order enable a Judge having Small Cause powers to a particular amount to try a suit exceeding that amount; that it is only the Local Government under section 15 of the Provincial Small Causes Courts Act and the High Court under section 28 of the Madras Civil Courts Act that can create a Small Cause Court or invest a Court with Small Cause jurisdiction; and that this power cannot be allowed to the District Court or a single Judge of the High Court; and

(*iii*) that in C.M.P. No. 151 of 1917 their Lordships Oldfield and Bakewell, JJ., actually decided that a Small Cause suit of the value of Rs. 1,627-4-6 could not be transferred to a District Munsif's Court as the case "could not ordinarily be disposed of by the District Munsif sitting as a Small Cause Court" and in no other case was the exact point raised and decided.

The decision seriously restricts and cuts down the scope of the useful provisions in section 24 of the Civil Procedure Code. A Small Cause suit could be transferred only to another Small Cause Court or Court invested with Small Cause powers and even then, only if that Court possessed the requisite pecuniary jurisdiction up to the amount in suit. But the necessity for transferring Small Cause suits to ordinary Courts in order to secure greater convenience in trial of suits, or to avoid conflict of decision and consequent embarrassment to parties frequently arises in the mofussil and is of considerable importance. It is therefore necessary to settle this question of practice so as, if possible, to give widest scope to the beneficent rule in section 24 of the Civil Procedure Code.

But is this restricted construction necessarily involved in the provisions contained in section 24 of the Civil Procedure Code? It is submitted, it is not so.

(*a*) It is true section 24 allows transfer only to a Court "competent to try and dispose of" the suit so transferred. The expression "competent, etc." in this connection receives sufficient significance if we take it to mean a Court exercising original civil jurisdiction up to the pecuniary limit of the transferred suit There is nothing in the "nature" of a Small Cause suit as such, which distinguishes it and takes it out of the category of civil suits so as to disentitle a District Munsif who

tries regular suits of far greater value and complexity, to render him incompetent to try and dispose it of. This is amply borne out by section 102 of the Civil Procedure Code which speaks of regular suits of "a nature cognizable by a Court of Small Causes." There is no difference between the nature of a Small Cause suit and any other suit for money. Only certain classes of civil suits called, probably on account of their simple nature, Small Cause suits, are allowed to be tried under a summary procedure with no right of appeal, in order to achieve speedy justice, and power is reserved to the Local Government and the High Court to establish Courts of Small Causes and invest experienced officers, with Small Cause powers, as a sort of guarantee against misuse of summary procedure by inexperienced and junior officers.

(*b*) Section 35 of the Provincial Small Causes Courts Act gives yet another indication that Small Cause suits are essentially suits of civil nature and suits of Small Cause nature can be tried and disposed of by Courts of Ordinary Civil Jurisdiction. It provides that where a Court of Small Causes (or a Court invested with the jurisdiction of a Small Cause Court) ceases *to have jurisdiction with respect to any case,* further proceedings in relation to the case whether before or after decree may be had in an ordinary Civil Court having jurisdiction. It may be noted that the section does not speak of the case where

(*i*) the Small Causes Court ceases to exist (as does section 37 (*b*), Civil Procedure Code), or

(*ii*) where the business of the Court is transferred to another Court (as in section 150, Civil Procedure Code) but it deals with the case where the Court ceases to have jurisdiction *with respect to any case.* It is perhaps difficult to conceive of such a case except where a particular suit is transferred or withdrawn.

(*c*) On the other hand this interpretation of the word "competent" is strongly supported by clause (4) of section 24, Civil Procedure Code itself, which says "The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall for the purposes of such suit *be deemed to be a Court of Small Causes.*" Where is the necessity to "deem" it to be a Court of Small Causes for the purpose of the transferred suit, if it must already be a Court of Small Causes. Such necessity arises only because suits from Small Cause Courts can

be transferred to Courts which are not (but for this clause) Small Cause Courts and are not invested with Small Cause powers. If a Small Cause suit cannot be transferred to any but a Small Cause Court, this clause would be superfluous and meaningless.

(*d*) Again, where the District Court withdraws a suit from a Small Cause Court, as it doubtless can, and tries and disposes of the same, can it be said that the District Court not being a Small Cause Court or invested with Small Cause powers has no jurisdiction to try the suit?

(*e*) If the Legislature intended that a suit from a Small Cause Court should under no circumstances be transferred to an ordinary Court nothing could have been easier than to add a proviso to section 24, suitably worded to that effect. But instead of that we find clause (4) which provides for deeming the transferee Court to be a Small Cause Court in respect of the suit transferred.

The learned Judge says: "It is only the Local Government that has the jurisdiction under section 15, Provincial Small Causes Courts Act, to invest particular Courts of Small Causes with jurisdiction up to Rs. 1,000 and under section 28, Madras Civil Courts Act, it is only the High Court (and not one Judge thereof) that has got jurisdiction by notification in the Official Gazette to invest District Munsifs with Small Cause jurisdiction and that only up to the amount of Rs. 300. It therefore seems rather curious that District Court or a Division Bench of the High Court should have power to direct District Munsifs to try suits of the value of Rs. 1,000 and Rs. 2,000 respectively as Small Cause suits." This argument overlooks that it is not the order of transfer of the District Judge but clause (4) of section 24 that invests the transferee Court with Small Cause powers for the purposes of the suit transferred. It is submitted, with great respect, that even the Local Government and the High Court derive the powers under particular sections of the Acts of Legislature and there should be nothing strange if the Legislature thought fit to give the District Court a much more limited power, to transfer a particular case to an ordinary Court, and in order to secure a special convenience, provides Small Cause powers in respect of a transferred case to the transferee Court which is otherwise competent. The power of the Local Government and of the High Court is general and wide in the sense that it covers *all suits* of civil nature below a particular value, while only subject to the conditions laid down in S. 24,

Civil Procedure Code, the District Judge is empowered to transfer a particular Small Cause suit to a District Munsif who for the purpose of that suit is *deemed* to be a Small Cause Court. The District Judge or a Bench of the High Court have no general power to "direct District Munsifs to try suits of the value of Rs. 1,000 and Rs. 2,000 respectively as Small Cause suits." Their power under section 24, Civil Procedure Code, is much more restricted and is a special power. In fact section 24 (4) creates a third class of Small Cause Courts. A Court of Small Causes is either (*i*) constituted as such, or (*ii*) is a Court on which Small Cause Court jurisdiction has been conferred, or (*iii*) is a Court which for a particular case is deemed to be such by a fiction sanctioned by section 24 (4) of the Civil Procedure Code.

Then as regards decisions of Courts on the question of interpretation of section 24, Civil Procedure Code, although there is no reported case which deals exactly with the meaning of the word "competent" in section 24, Civil Procedure Code, substantially the same question was raised in several reported cases and answered against the view propounded by the decision under notice. Under clause (4) of section 24, Civil Procedure Code, the Court trying a suit transferred from a Court of Small Causes shall for the purpose of the suit be deemed to be a Court of Small Causes. It is argued that where a suit is transferred, not from a Court of Small Causes, but from a Court invested with Small Cause jurisdiction, this clause has no application. The considerations urged in support of this argument are:

(*i*) that the Provincial Small Causes Courts Act draws a distinction between:
 (*a*) Court of Small Causes, and
 (*b*) Courts invested with Small Cause jurisdiction and that as section 24 (4) speaks of the former, it cannot be made to imply the latter also;

(*ii*) that the Legislature cannot be held to have intended that a mere order of a District Judge should have the effect of investing the presiding officer of a particular Court with certain powers where such powers can only be conferred ordinarily by an order of the Local Government. This argument found favour with the Bombay High Court in *Bhagvan Dayalji* v. *Balu*[1] and *Ramchandra* v. *Ganesh*[2] and with the

1. (1883) I.L.R. 8 B. 230. 2 (1898) I.L.R. 23 B 382.

Calcutta High Court in *Dulal Chandra Deb* v. *Rani Narain Deb.*[3] But this view was upset in later decisions of these Courts. (Vide *Narayan* v. *Bhagu,*[4] *Akshay Kumar Shaha* v. *Hira Ram Dosad,*[5] *Madhusudan Gope* v. *Behari Lal Gope*[6] and *Badal Chandra Prohel* v. *Srikrishna Dey Nag*[7]). The Allahabad High Court took a different view from the very beginning (vide *Kauleshar Rai* v. *Dost Muhammad Khan,*[8] *Chhotey Lal* v. *Lakhmi Chand,*[9] *Sukha* v. *Raghunath Das*[10] and *Chaturi Singh* v. *Mt. Rania*[11]). The Madras High Court followed the Allahabad view in *Sankararama Aiyar* v. *Padmanabha Aiyar*[12] and the Patna High Court also holds the same view (*Bhagawan Das* v. *Keshwar Lal*[13]). All the High Courts are agreed on this view.

Now, all these cases show that the practice of transferring cases under section 24 from Small Cause Courts or Courts invested with Small Cause powers to ordinary Courts (not possessing such powers except as a result of the transfer order) is widely prevalent in all the provinces. They show further that all the High Courts have proceeded on the footing that a suit from the file of a Small Cause Court could be transferred to an ordinary Court which by virtue of the transfer becomes for the purposes of the suit so transferred a Small Cause Court. Then, they raise the further question whether or not "Small Cause Court" would include "a Court invested with Small Cause powers." These rulings hold that by virtue of the very transfer, under section 24 (4) the transferee Court becomes a Small Cause Court, whereas Anantakrishna Aiyar, J., holds you cannot transfer a Small Cause suit to a non-Small Cause Court. The decision under notice strikes at the very root of all these pronouncements. It may also be noted that the very argument advanced in favour of the narrower construction of the word "competent" (*viz.*, the District Judge being able to do what was reserved only for the Local Government by the Legislature, etc.) was favoured by the learned Judges in *Dulal Chandra Deb*

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3 (1904) I.L.R. 31 C. 1057. 4 (1907) I.L.R. 31 B 314
5 (1908) I.L.R. 35 C 677 6. (1918) 27 C.L J. 461
7 A.I.R. 1929 C 354
8 (1883) I.L.R 5 A 274
9. (1916) I.L.R 38 A 425 · 34 I.C. 113
10. (1916) I.L.R 39 A 214 37 I C. 809
11. (1918) I.L.R 40 A 525: 46 I.C. 893
12 (1912) I L.R. 38 M 25 · 23 M.L.J. 373.
13 A.I.R. 1923 Pat. 49

v. *Rani Narain Deb.*[3] It was pressed by the applicant in *Sukha* v. *Raghunath Das*[10] (*vide* page 215) and dealt with by Piggott, J., at page 219. In *Madhusudan Gope* v. *Behari Lal Gope*[6] the point arose perhaps more directly than in others. A Small Cause suit was transferred by the District Judge to and decided by another Court not having Small Cause powers to the extent of the amount involved in the suit. The plaintiff preferred a revision against the decision to the High Court under section 25 of the Provincial Small Causes Courts Act and it was argued that the Lower Court had no jurisdiction to try and dispose of the suit. The learned Judges rejected the contention observing that section 24 (4) makes the Lower Court a Small Cause Court for the purpose of the case. In *Sankararama Aiyar* v. *Padmanabha Aiyar*[12] a Small Cause suit from the Sub-Court, Tuticorin, was transferred under section 24 (4) to the District Munsif's Court of Srivaikuntam and then to the District Munsif of Tinnevelly. It was observed by Sundara Aiyar, J.: "That the District Munsif's Court of Srivaikuntam and the Additional District Munsif's Court of Tinnevelly were both Courts competent to dispose of the suit cannot be doubted." Again at page 31, "It is suggested during the arguments that the order of transfer should therefore be regarded as wholly void. But this does not appear to be the correct view to be taken. The District Judge had power to transfer the suit; but had no jurisdiction in doing so to order that the suit should be tried on the regular side contrary to the provision in section 24, Civil Procedure Code."

The decisions in *Bagiammal, In re*[14] and *Manicka Chettiar* v. *Kuppuswami Naicker*[15] are perhaps distinguishable, being cases under the Madras City Civil Courts Act. Section 3 of that Act takes away from the jurisdiction of the City Civil Court suits cognizable by the Small Cause Court, and section 5 makes a special provision for transfer of work from one Court to the other where it is necessary. The general provision in section 24, Civil Procedure Code, does not apply. As regards C.M.P. No. 151 of 1917, the learned Judges hold in that case, that the transfer "should not be granted in the circumstances" of the case. They do not say that they have not got

3 (1904) I.L.R 31 C 1057
6 (1918) 27 C.L.J 461
10. (1916) I.L.R. 39 A 214: 37 I.C. 809
12. (1912) I.L.R. 38 M. 25 23 M.L.J. 373.
14. (1917) 32 M.L.J. 258
15. (1926) 25 L.W. 115.

the jurisdiction to transfer. After all it must be remembered that transfer is a matter of discretion to be exercised in the circumstances of each case by the District Judge or the High Court, even in cases which do come under section 24, Civil Procedure Code. The case does not contain any discussion of the relevant provisions of law or of the considerations mentioned above. It cannot therefore be taken to be a ruling which should settle this important question of practice.

In conclusion, it is submitted that section 24 (1) (*b*) (*ii*) relating to "competency" of the Court to which the suit is to be transferred should be construed in such a manner as not to render clause (4) meaningless. The two clauses need not necessarily clash with each other and can be harmonised.

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SUMMARY OF ENGLISH CASES.

J. GLIKSTEN AND SON *v.* GREEN, (1929) A.C. 381 (H.L.).

Income-tax—Company trading in timber—Insurance against fire—Loss of timber by fire—Timber valued at estimated price deducting depreciation, etc.—The estimate less than the insurance amount received—If the whole amount should be included in Profit and Loss Account.

A large quantity of timber belonging to a company carrying on business as timber merchants was destroyed by fire and in respect of this loss, the company received large sums from various insurance companies. For many years past, the company had been allowed to deduct the premiums paid by it in respect of the insurance policies. In the company's accounts, the stocks were every year valued at cost or market value, whichever was the lower and large sums were also written off as for depreciation. The value as per the account of the timber destroyed stood at 160,824*l.*, whereas the amount received from insurance companies was 477,838*l.* The question was if the whole of the insurance money constituted a trading receipt and should have been brought into profit and loss account for the year in question.

Held, the amount received is a gain of the company in the course of its business no less than the sale price of the timber would have been, if the timber had been sold in the course of ordinary sales during the continuance of the company's busi-

ness and the amount received from insurance must be brought into the profit and loss account for the purposes of income-tax. The result of the fire was that they got rid of so much timber for the insurance figure.

HAGART AND BURN-MURDOCH *v.* COMMISSIONERS OF INLAND REVENUE, (1929) A.C. 386.

Income-tax—Solicitors—Lending money to clients in the hope of large amount of legal business—Loss on such loans—Habit of the firm to make such loans to clients—If a permissible deduction.

A firm of solicitors at Edinburgh advanced large sums of money to certain of their clients who were interested in promoting a company to experiment with a new metal alloy invention. This firm of solicitors was in the habit at times of lending money to their clients. The solicitors became law agents of the company and expected the company to extensively develop, but unfortunately the company failed and the solicitor's advances lost. The Commissioners found that "the sole relations between them (solicitors) and the company were those of solicitor and client, in the course of which they also became creditors for the advances."

Held, the loss of money so advanced cannot be treated as a loss in ascertaining the profits and gains of the profession of solicitors. It was a separate venture from that of solicitors and even if undertaken in the hope that it would help their business, it was none the less no part of their true profession, nor necessary for it.

Lord Shaw of Dunfermline.—"It is in the highest degree doubtful whether any custom could avail to bring banking or money-lending within the scope of a solicitors' business."

Usher's Wiltshire Brewery Co. v. *Bruce,* (1915) A.C. 433 referred.

SHOTTS IRON CO. *v.* CURRAN, (1929) A.C. 409 (H.L.).

Workmen's Compensation Act, 1925, *S.* 8, *Sub-section* 1—*Leaves one or more children—Children, meaning of—If includes infant dependents other than workman's own sons and daughters.*

Held, by a majority (Lord Carson dissenting).—"Children under the age of fifteen" in the context refers to those infant members of the deceased workman's family who

were being supported wholly or in part by the deceased workman's earnings and includes brothers and sisters also.

Pritchard v. *Bettisfield Colliery,* (1925) 2 K.B. 284 and *Campbell* v. *Portland Colliery Co.,* (1926) S.C. 512 followed.

The question if it takes in illegitimate children left open.

FINCH *v.* COMMISSIONER OF STAMP DUTIES, (1929) A.C. 427 (J.C.).

Gift—Death Duties Act, 1921 (*New Zealand*), *Ss.* 38 and 39, *Sub-section* (*f*)—*Voluntary expenditure on alterations to the wife's house—If amounts to a gift of the expended amount.*

A husband and wife were living together in a house belonging to the wife. They enjoyed a separate income and the wife's income was habitually under contribution to the household expenditure. Within three years before his death, the husband expended large amounts in alterations and repairs to the house in which they were living. The husband was then only 53 and the object was found to be the improvement of the family home. By S. 38 of Death Duties Act, 1921 (New Zealand), gift is defined to mean any disposition of property made otherwise than by will..........without fully adequate consideration in money or money's worth and by S. 39, sub-section (*f*) "a disposition of property" means "any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of his own estate and to increase the value of the estate of any other person."

Held, that the transaction to be a gift within the meaning of the sub-section, it must have been entered into intending to have the effect stated therein and it is not enough merely to prove that it has that effect. Nor can the mere fact of voluntarily spending money on the property of the donee make it a gift unless he had the intention to make a gift.

CANADIAN PERFORMING RIGHT SOCIETY *v.* FAMOUS PLAYERS CANADIAN CORPORATION, (1929) A.C. 456 (J.C.).

Copyright—Infringement of—Assignee—Non-registration of assignment—If S. 39 bars a suit against competing assignees or any action under the Act—Construction—Statute.

The assignees of the assignees of the performing rights of certain musical works brought the action to restrain the respondents by injunction from infringing their copyright. The

assignment was not registered and the question arose if S. 39, sub-section (1) of Copyright Act, 1921, prohibited the plaintiffs from suing even strangers.

Held, the assignment not having been registered and the action being an action under the Act, the suit was not maintainable and the section is not confined to an action between competing assignees only. It is the only duty of a tribunal of construction "to say what the words mean, not what they should be made to mean in order to avoid inconvenience or hardship". But "if it could be established that the provision in question is capable of two meanings, one of which produces a reasonable and the other an unreasonable and unjust result, much might be said in favour of adopting the former."

GANAPATHY PILLAI *v.* ALAMELOO, (1929) A.C. 462 (J.C.).

Will—Construction—Property to be divided between 4 sons after 21 years from testator's death—Issue of deceased sons to take the father's share—In the event of a son dying without issue, the surviving sons to take equally—If issue can claim with surviving son a share in a deceased son's share.

A testator by his will bequeathed his properties in favour of trustees with directions to divide the trust funds into five shares twenty-one years after his death and pay one of such shares to his wife and to pay one other of such shares to each of his sons Parimanum, Komarasami, Ratnam and Ganapathi, and in the event of any such son dying before the expiration of such period 21 years leaving child or children him surviving they shall take the share to which such son of his would have been entitled to if he had survived the 21 years period and in default of issue of any son the share of such son to be payable to the surviving sons equally between them. Within the 21 years period, Ratnam died without issue, Parimanum and Komarasami leaving one child each and Ganapathi was surviving. The question arose if the share of Ratnam survived to Ganapathi along with or was to be divided between him and the children of the brothers.

Held, that the terms of the original gift to the sons are such as to create a plain vested gift and the subsequent alternative gifts operate by way of divesting in certain events that vested gift and the share of the son who dies before twenty-one years without issue is payable to the surviving son, without any

provision for the substitution of the issue of a son who has died during the period.

GROVE-GRADY, *In re.* PLOWDEN *v.* LAWRENCE, (1929) 1 Ch. 557 (C.A.).

Trust—Charitable trust—Bequest to trustees to found and maintain a society for the preservation of animals not human—No distinction made between domestic and wild animals—If a valid charitable trust.

A testatrix devised and bequeathed by her will the residue of her estate after paying certain debts, etc., for the founding and maintaining of a charitable institution called "Animals Benevolent Society". The members of committee of management were required to be anti-vivisectionists. The purpose of the Society was to provide refuge, etc., for *"all animals, birds or other creatures not human"* generally. The question was if this provision does not offend against rule of perpetuities.

Held, by Romer, J, that a gift the object of which is to prevent cruelty and suffering to the lower animals is charitable because it tends to promote public morality by stimulating the generous sentiments in man towards the lower animals and for that purpose it is irrelevant to consider if the animals sought to be helped are such as are beneficial to the mankind or positively harmful to them.

On appeal, held by a majority (Lord Hanworth, M.R, Russell, L J., and Lawrence, L.J., dissenting).—Upon the authorities a trust in perpetuity for the benefit of animals may be a valid charitable trust if in the execution of the trust there is necessarily involved benefit to the public. But where, as in this case, there is no provision for the admission of the public into the area or for the non-molestation by the other animals in the area, there can be no charitable trust.

In re Wedgwood, (1915) 1 Ch. 113 explained.

Per Russell, L.J.—"It is well settled that if consistently with the trust the funds may be applied for a purpose not charitable, the trust will fail for perpetuity notwithstanding that the funds might under the trust have been applied for purposes strictly charitable."

MACLEAN *v* WORKERS' UNION, (1929) 1 Ch. 602: 141 L.T. 83.

Trade Union—Expulsion from the Union by the Executive Committee of—Executive both prosecutor and Judge—Bias

of two members—Committee acting in good faith—Member heard in support of his case—If court can interfere.

The plaintiff, member of a Trade Union, was expelled from the Union, by the Executive Committee of the Union purporting to act under the rules of the Union. The charges were that (*i*) he issued certain circulars without the approval of the Union and (*ii*) published an election address in a form not authorised by the Union. The plaintiff was given an opportunity to support his case and after hearing him the expulsion was confirmed by the executive. It was contended that (*i*) the proceedings were void as the Executive Committee acted both as prosecutor and judge and (*ii*) some of the members of the committee were biassed against the plaintiff.

Held, that the jurisdiction of the Courts in regard to domestic tribunals was of a limited nature and if those tribunals acted fairly, honestly and in good faith in exercise of its powers, the courts cannot interfere even if hardship is thereby caused to some of its members. It is settled law that if the parties to a contract agree that a person who may well be suspected of a *bias* or who may be deciding his own cause shall be judge in a dispute between the parties, the courts will not interfere.

Leeson v. *General Council of Medical Education and Registration,* (1889) 43 Ch. D. 366 applied.

Dawkins v. *Antrobus,* (1881) 17 Ch. D. 615 followed.

STIMSON *v.* GRAY, (1929) 1 Ch. 629.

Vendor and purchaser—Contract for sale of land—Possession taken in pursuance thereof by purchaser—Sale subject to certain covenants—Mistake between parties regarding them—Material terms missing from the contract—Court if and when can supply—No enforceable contract—If damages can nevertheless be awarded.

By a contract for the sale and purchase of land, it was agreed that the purchaser was to use the land subject to certain restrictions. The copy of the restrictions sent to the purchaser by the vendor's agent was not the correct one and it did not contain a material term, *viz.*, a restraint on using the premises for trade purposes, though the vendor contemplated the restriction. The purchaser had entered into possession of the house as for residence and later wanted to open a shop. On objection by the defendant vendor, this action was brought for specific performance of the contract or for damages.

Held, in a case in which there has been part performance and a long enjoyment of possession, the court is generally unwilling to hold that the contract is incomplete, but if the court is unable to determine all the material terms of the alleged contract, either by interpretation of the language used or by holding that the missing terms are such as the law will supply, it is not possible to hold that there is a binding contract. In such a case not only can no specific performance be decreed, but no damages either can be assessed.

Lord Wrenbury's observations in *Waring & Gillow Ltd.* v. *Thompson*, (1912) 29 T.L.R. 154 followed.

WALTER, *In re*, SLOCOCK *v.* OFFICIAL RECEIVER, (1929) 1 Ch. 647.

Bankruptcy—Death of bankrupt undischarged after adjudication—Will by bankrupt subsequent to adjudication—Personal earnings of bankrupt subsequent to adjudication—Creditors since adjudication entitled to the exclusion of prior creditors—Funeral expenses if to be paid in full.

After adjudication, but before discharge, the bankrupt secured a job and earned some moneys which he had placed in a bank. He died undischarged and left a will appointing plaintiff as executor. The executor spent for his funeral expenses out of pocket. There were also bills outstanding for goods supplied since bankruptcy.

Held, as regards personal earnings, the bankrupt is entitled to retain for himself and spend what was necessary to maintain himself and his family reasonably and if it happens that he dies before having paid those who have supplied the necessary commodities, they are entitled to be paid for before the trustee takes anything—the question being if the debts are or are not necessaries. As regards funeral expenses, that both by analogy to S 130, Bankruptcy Act, 1914, and on general principle, the executor is entitled to be paid the reasonable funeral expenses in full before the trustee in bankruptcy can come in.

PONTARDAWE RURAL DISTRICT COUNCIL *v.* MOORE-GWYN, (1929) 1 Ch. 656.

Nuisance—Neighbouring premises owners—Rocks on the summit of a bluff or steep incline on defendant's land—Fall of rock causing damage to plaintiff's premises—Fall due to weathering—Liability of defendant for damages.

The action was brought for relief in respect of certain rocks on defendant's land which were on a slope and steep incline and in such a situation as to be dangerous to plaintiff's land, if as once happened, they decayed due to weathering causes and fell down. The question arose if the defendant was or was not liable to the plaintiffs, to execute necessary works to maintain the rocks in a condition of safety, though it was a natural formation and not brought on to the premises by the defendant.

Held, that the action was an attempt to impose on an owner, who is using and enjoying his land in the ordinary manner of its use and reasonably, liability for damage sustained by the property of another through natural agencies and such an action cannot be maintained.

Rylands v. *Fletcher,* (1868) L.R. 3 H.L. 330 and *Giles* v. *Walker,* (1890) 24 Q.B.D. 656 referred to.

In re WHITAKER. ROOKE *v.* WHITAKER, (1929) 1 Ch. 662.

Tenant for life and remainderman—Will—Testator declaring his residue to be in trust for his widow for life and his children after 21—Freehold, houses belonging to the estate—Houses kept in tenantable repair, but notice from Local Council to improve the structure—Expense thereof if to be borne by capital or income.

Though the trustees under the will were carrying out the necessary periodical repairs to keep the houses in a tenantable condition at the expense of income, in compliance with a dangerous structure notice served on them by the London County Council, extensive repairs involving the pulling down, rebuilding and reinstatement of the houses were made and the question was if the expenses were to be borne by capital or income.

Held, that where the expenditure was to make good defects due to periodical neglect, it must fall on income [*In re Gray,* (1927) 1 Ch. 242]; but where it involved structural reconstruction of a permanent nature, it must fall on the corpus.

In re Robins, (1928) Ch. 721 distinguished.

In re Hotchkys, (1886) 32 Ch. D. 408 referred.

BAKER *In re.* BAKER *v.* BAKER, (1929) 1 Ch. 668: 141 L.T. 29.

Will—Codicil—Successive wills and codicils, each revoking the earlier—Last codicil referring only to and confirming the first will—If revokes the later wills and codicils impliedly.

A testatrix made a will in 1893 with certain provisions therein. In later years she made other wills which expressly revoked the 1893 will. But in 1921, she made a codicil by which she stated that she gave one of her houses to her daughter and "in all other respects confirm my said will and codicil" referring by the "said will" to the will of 1893.

Held, that the effect of the codicil of 1921, was to displace the later wills and revive the first. "It became both first and last."

Re BINNIS. PUBLIC TRUSTEE *v.* INGLE, (1929) 1 Ch. 677: 141 L.T. 91.

Will—Share of residue—To testator's children attaining a certain age and if any such child should die, his children to take the parent's share—Parent liable to the estate—If the children entitled to share without liability to pay the debt.

A testator, by his will, left a share of the residue to a daughter for life and after her death upon certain trusts to her children and grandchildren and if as happened, the daughter died issueless, the share was to go to his other children in equal shares and if any of his children so entitled to take were dead, then that child's share to go to his or her children, such children "to take only such share as his, her or their parent would have taken if living". One son so died and his children claimed his share. That son owed a certain amount to the testator's estate and it was contended that as that son would be entitled to take the share less the debt, so his children under the clause can only take the share less the debt.

Held, that what was given to his children was the share which in the first instance the parent would have taken and not what he would ultimately have received after the trustees under the will had exercised their right to pay the debt out of the share.

In re Scott, (1903) 1 Ch. 1 explained and distinguished as a case of an advancement to the testator's child and not a case of a debt or liability of the legatee to the testator's estate.

MINTER *v.* PRIEST, (1929) 1 K.B. 655: 141 L.T. 140.

Defamation—Solicitor—Defamatory statements alleged to be made by solicitor about the plaintiff to his client—Client eventually not engaging the solicitor—If statements privileged.

It was alleged that the plaintiff, a property dealer, was slandered by the defendant (solicitor), the slander consisting of statements made to a person who consulted him with regard to the purchase of some property of the plaintiff. The solicitor was not eventually engaged, for the client, and in an action for slander, the question arose if statements made by the solicitor who finally declines to act can be privileged.

Held, after a consideration of the cases, that if what passes is with a view to, and for the purpose of retaining the solicitor, then it is protected even if the solicitor does not accept the retainer, so long as there is no duty cast on the solicitor as a citizen to give evidence of a crime or fraud contemplated by the client.

JOTTINGS AND CUTTINGS.

Sir V. Bhashyam Aiyangar's Statue: Unveiling Ceremony.—On Friday, the 18th October, Sir P. S. Sivaswami Aiyar unveiled the bronze statue of Sir V. Bhashyam Aiyangar which the Government permitted to be located within the High Court compound in front of the Advocates' Association. The large gathering that assembled to participate in that function testified to the respect in which his memory is still held in Madras.

Dewan Bahadur T. R. Ramachandra Aiyar, the President of the Association, opened the proceedings with the following speech:—

"It is a matter of proud privilege and profound pleasure for me to rise to give expression to the cherished sentiments of esteem and affection that I have felt to Sir V. Bhashyam Aiyangar, known to the members of our Bar as "THE PRINCE AMONG LAWYERS". He belonged to the orthodox community of South Indian Vaishnavites. Many indeed were the achievements made by him for the Profession of Law. A student of Law all his life, a jurist of unsurpassed renown, a Judge of great ability, a stalwart member of the local Senate and Syndicate for nearly quarter of a century, a public-spirited politician of moderately progressive views, a silent benefactor, a distinguished countryman, the first Indian Advocate-General in our land, his memory will ever be enshrined in the midst of hallowed associations and his name, we all feel sure, will ever stand

out prominently among the foremost of the shining stars in our legal firmament. This statue, which to-day is unveiled to public gaze by our talented friend Sir P.S. Sivaswami Aiyar, will ever remind us of the great and good part played by him in building the Vakil Raj and helping it to occupy the proud position which it to-day occupies and to wield that amount of vast influence which it to-day wields among the masses and the intelligentia of our hoary Motherland.

On his death in November, 1908, the Government expressed its appreciation of his services in the following terms:—

"NOTIFICATION. *Fort St. George, November* 24, 1908, *No.* 642.—His Excellency the Governor in Council has received with very deep regret the intelligence of the death of Sir Vembakam Bhashyam Aiyangar, *Kt.*, C.I.E., and desires to record his appreciation of his high character as well as of the public services rendered by the deceased in the course of a long, strenuous and distinguished career.

He served almost continuously as a member of the Provincial Legislative Council since his first nomination to it in the year 1888 and in that capacity he was ever ready to place his great abilities as a jurist and his intimate acquaintance with the practical working of the laws at the service of the Council.

So pre-eminent a position had he attained in his profession that he was appointed to officiate as Advocate-General in the Presidency, being the first Indian to occupy that great place; the duties of which he performed with fidelity and indefatigable industry. In 1901 he was elevated to the Bench as a Judge of the High Court of Judicature, an office which he discharged with conspicuous ability and with great satisfaction to the public.

His public services and his high personal character have been recognised by the Government on many occasions. His loss will be greatly felt both by the Government and the people. The memory of his honourable life will long survive him to furnish an inspiring example to his countrymen.'

It was universally felt that his memory should be perpetuated in a suitable form and an appeal was accordingly sent by the Vakils' Association to the public calling for subscriptions. Though the appeal was generously responded to for one reason, and for another, the proposal did not for a long time materialise till at last in 1923 it was decided that a statue should be put up at a cost of Rs. 12,000. Tenders were called for and the work was finally entrusted to Mr. S. Nagappa, the well-known local sculptor and artist. The statue was ready in September, 1927, but some time had necessarily to be spent thereafter in

settling the location of the statue. After settling the place, the sanction of the Government of India had to be obtained and the order of the Government approving of the selection of the site and giving sanction was obtained only recently. We are thankful to the Hon'ble The Chief Justice and the other Judges for their cordial co-operation in this matter. We are glad we have at last redeemed, however inadequately it may be, the long overdue debt to the memory of the great lawyer the extent of the obligation to whom of the public in general and the legal profession of this country in particular can hardly be over-estimated."

It was in the fitness of things that Sir P. S. Sivaswami Aiyar should have been requested to unveil the statue and, in doing so, he said:

"I deem it a privilege to be called upon to take part in this function for the purpose of doing honour to the memory of Sir V. Bhashyam Aiyangar who was one of the most distinguished members of the profession to which we belong. I believe this privilege is due to the fact that I happen to be one of the few survivors of the generation of lawyers that knew him well. Since his death, 21 years ago, a new generation of lawyers has come into being and grown up the members of which have not heard or seen him and to whom he is only a name. It is somewhat singular that such a distance of time should have intervened between his death and the erection of this monument in his honour. Into the circumstances which have led to this long delay it is needless to enter. Perhaps it is due to our oriental characteristic of sluggishness and indifference to time. It may perhaps be interpreted as evidence of the enduring fame achieved by Sir V. Bhashyam Aiyangar as the greatest lawyer that this Presidency has produced. It is a sign that his reputation is still uneclipsed and cherished as a rich legacy by the profession. The triumphs of a practising lawyer are of a fleeting character. They survive only in the memories of his contemporaries and in bar room anecdotes. His performances are not creative like those of men of talent in some other walks of life. Too often his merits are not known to the public at large and are soon lost in oblivion. The memorial which will be unveiled this afternoon is the abiding tribute of a grateful profession proud of the eminence attained by Sir V. Bhashyam Aiyangar and of his achievements. He was great not merely as a Lawyer and Jurist, but also as an Advocate, as a Judge and as a Legislator. If a Judge has not the same opportunities for making a fortune as a lawyer, he has an advantage in his

ability to leave an enduring record of his performances which may live after him provided they contain any worthy contribution to the science of law. What were Sir Bhashyam Aiyangar's titles to unique distinction and to abiding remembrance in the minds of the profession? When he joined the ranks of the legal profession as a High Court Vakil, there were three separate branches of the profession—the Barristers, the Attorneys, and the Vakils. Owing to the superior recognition and preference then accorded to the Barristers as representatives of the oldest branch of the law and owing to the fact that the profession of Vakils in this country was comparatively in its infancy, Vakils were generally looked upon as members of an inferior branch and the Vakils were themselves in the habit of acknowledging the Barristers as their superiors and playing a subordinate and secondary part. In all important cases, Vakils were in the habit of engaging and instructing Barristers as senior counsel. Madras was the Province in which the Vakils emerged earliest from this state of dependence and parasitism. Bengal followed us and I do not know whether the Vakils in Bombay have even at the present day achieved their independence of the Barristers and learnt to respect themselves. If the legal profession has been unified within the last few years and if the arbitrary distinctions between the different branches have been abolished, it is due entirely to the success and the distinction achieved by the Vakils in Madras, Bengal, Allahabad and other parts of the country. Of the men who were our leaders in this movement for independence and self-respect Sir V. Bhashyam Aiyangar occupied the foremost place in Madras as Sir Rashbehari Ghose did in Bengal. When Sir Charles Turner arrived in Madras as Chief Justice, he was surprised to find Vakils conducting important suits and appeals without the assistance of any Barristers. When Sir Charles Turner retired in 1885, a few months after my enrolment, the Vakils had made good their position and continued to maintain it ever afterwards. Sir V. Bhashyam Aiyangar had then attained pre-eminence at the Bar. On his arrival in Madras from Allahabad Sir Charles Turner entertained the idea that Mr. Justice Mahmood was the greatest Indian Jurist in India. But long before he left Madras he had come to the conclusion that Sir Bhashyam Aiyangar was a greater Jurist than Mr. Justice Mahmood. In whatever light it may be regarded by the clients who have to pay fees it was Sir Bhashyam Aiyangar who helped to raise the scale of fees paid to Vakils and who raised the status and prestige of the Vakils. To have raised the status

of the Vakils and their position in the estimation of the Judges and the public was no small achievement for which the present generation of Lawyers is indebted to Sir Bhashyam Aiyangar in particular and his contemporaries generally. But this is not his only title to remembrance as a Lawyer and an Advocate. If any man was ever a born Lawyer, Sir Bhashyam Aiyangar was one. He had the legal instinct and the legal mind. He had an unrivalled mastery of the principles of law which he often said were the expression of a highly cultivated common sense applied to the determination of rights and duties in the complicated relations of human beings. His methods of work and his devotion to duty were an example and an inspiration to his juniors If I were called upon to mention his leading characteristics as a Lawyer and as an Advocate, I should mention the thoroughness with which he studied his cases, the care with which he managed the presentation of his cases, his extreme wariness and alertness, his readiness of resource, his clarity of thought and his precision of language. It may not be given to all of us to be subtle or profound as he was, but there is nothing to prevent the cultivation of his other virtues. He had some of the limitations of the majority of lawyers. He was not interested in many other matters besides law. His style lacked the literary grace of Sir Rashbehari Ghose. His intellect was cold and dry, and his legal studies had a desiccating tendency. The dry light is not what appeals to a mixed audience. As a Judge of the High Court, an office which he adorned and which unfortunately he was allowed to hold only for less than three years, it was his ambition to purge the reports of all the rotten decisions. He purposely arranged with the Registrar to post the most intricate cases before him. To him, the law was only the handmaid of justice. He was keen on brushing aside all technical formalities which impeded justice. But he never mistook the function of the Judge for that of the Legislator or sought to advance any pet theories or notions by going against well-understood principles of law or the weight of evidence. His record as a Judge is superior in quality and volume to that of many another Judge in 15 years. His range of reading outside law was very limited, but he had an originality of mind which enabled him to throw fresh light upon any subject upon which he was consulted. As a Legislator he had a remarkable capacity for draftsmanship which should make the law fool-proof. His Gains of Learning Bill which he successfully piloted through the Legislative Council was unfortunately vetoed by the then Governor in deference to the foolish agitation of the ignorant

and it has now been re-introduced after thirty years in the Indian Legislature in the same form. His services as a Legislator were frequently utilised by the Government and eventually rewarded with the Advocate-Generalship which he was the first to discover could be held by a Vakil. Had he been born in England he would have risen to and adorned the Woolsack. Of the great Chancery Judges with whom comparison is naturally suggested, the one whom Sir Bhashyam Aiyangar most resembled was Sir George Jessel, the great Master of the Rolls. To have found the Vakils weak, unorganised and dependent, and left them organised, manly and self-reliant, is that not a claim to our grateful recollection and to the perpetuation of his memory? I am glad it has been permitted to me to pay my homage to the memory of a great and admired leader."

Mr. Alladi Krishnaswami Aiyar in proposing a vote of thanks said:

"Sir P. S. Sivaswami Aiyar, my Lords and Gentlemen,—I have been commissioned by the Secretary of our Association to perform the very pleasant duty of proposing a hearty vote of thanks to Sir P. S. Sivaswami Aiyar and to the distinguished concourse of gentlemen that have responded to our invitation. Possibly the justification for the procedure adopted by the Secretary lies in the fact that for the time being I happen to hold an office which is pre-eminently the acquisition to the profession in Madras of Sir V. Bhashyam Aiyangar's. We are particularly grateful to you, Sir, for consenting to take part in to-night's function and to unveil the statue. You are one of the few representatives of the older generation of giants and brilliant galaxy of legal talent that adorned the profession some 20 or 25 years ago, before whom most of us here are pigmies. I hope I will be pardoned if I give expression to an oft-repeated sentiment of mine that the profession is to-day what the immortals in the profession have made it for us. To most of the lawyers that are assembled here the matchless advocacy of Sir Bhashyam, his deliberative and slow if somewhat halting manner, his close analysis, his penetrating intellect, his wonderful adaptability, his power of divination and insight into the working of the mind of the Judges before whom he practised may perhaps be merely a tradition and an idea. But his passion for the profession as such and his almost spiritual devotion to the pursuit of law as a science have become a part of the heritage of the profession in this Presidency. The Law Reports, which are illumined by his masterly judgments,

which form a special chapter on Indian Jurisprudence, bear eloquent testimony to his scholarly erudition, to his insight and to his legal acumen.

As you have rightly pointed out, there is this distinction between a Judge and a practising lawyer. From the very nature of things, the forensic talents of a lawyer, however much they might have contributed to the shaping of the law, are of an ephemeral nature: but a Judge's reputation, if the Judge is of the right type, survives his time and in some cases is everlasting.

In my younger days at the Bar, if a member of the profession wanted to master the intricacies of an Indian enactment or a particular branch of law, there was no better course open to the young student than to closely study the judgments of Sir Bhashyam in the Full Bench and various other cases in which he took part during that period of intense legal activity of 2½ years in this Court when he was a Judge.

You will forgive me if I make reference to one personal incident. I happened to be a complimentary junior in the last case in which he appeared with Mr. Sundaram Aiyar. The argument which he then addressed to the Court when he traced the development of the conception of property in this country and compared it with the notions of property obtaining in England, is still fresh and vivid in my mind: and it is a source of pride to me that he very kindly took up a reference which I handed to Sir V. Bhashyam about the notion of property in Hindu Law as developed in West and Buhler.

I shall close my remarks with the fervent hope and with the prayer that the career of Sir V. Bhashyam Aiyangar will serve as a beacon light to this generation of lawyers and to the generations yet unborn. It may not be given to all of us to rise to the eminence of Sir Bhashyam and to the stately wisdom of you, Sir, who is taking part in to-night's function: but it is within the power of each one of us, the humblest and the simplest of us to walk in the footsteps of the great and the mighty.

There is one other duty I have to perform and that is to propose a hearty vote of thanks to my Lord the Chief Justice and the other Judges who have very kindly responded to our invitation. The Bar and the Bench are not distinct institutions and it is a very gratifying and healthy sign to note that the Judges of our Court realise that they are part of ourselves."

Mr. Justice Astbury.—Although no official announcement of the fact has yet been made, it is gene-

rally known that Mr. Justice Astbury, who has been a Judge of the Chancery Division since 1913, will not return to the Courts after the Long Vacation. The learned Judge's methods have sometimes been criticised, chiefly on the ground that he was apt to indicate very definitely when he thought a case ought to be settled; but those who knew him best were well aware that he was inspired by a veritable passion for doing justice between the parties before him, and that nothing distressed him more than to have to give, on legal grounds, a judgment which was not, in his view, in accordance with the precise merits of the case. At the Bar, Sir John Astbury had a remarkable reputation for a Chancery leader; he was recognised as being fully the equal of any of his contemporaries in ordinary Chancery work, he was constantly engaged in patent cases, and he was noted for being as able at cross-examination as any light of the Common Law Side. On the Bench, as at the Bar and in Parliament, he was personally immensely popular; and the regret which is felt at his resignation is increased by the knowledge that it is, to some extent at any rate, due to trouble with his eyes. Mr. Justice Astbury carries with him in his retirement the respect and the affection of the profession.—*L.J.*, 1929, p. 69.

The House of Lords.—All plans for the reform of the House of Lords appear to be doomed to failure. Whether they are big or little, the result is the same. Lord Darling's plan, which was discussed and rejected by that House on the 24th ultimo, was so small as hardly to deserve to be called reform. It only proposed to bring into effect the provisions of the "Act for the placing of the Lords in the Parliament" (31 Hen. VIII, c. 10), to which Prof. Pollard called attention recently, and which we stated three weeks ago (*ante* p. 18). Under this Act, Officers of State who are not peers are entitled to seats in the House but have no votes. Lord Darling proposed to make this provision operative by a resolution that any Minister of the Crown who is a member of the other House shall have the right to sit and speak in the Lords, but not to vote. As he pointed out, this is already the position of the Judges, who are summoned to Parliament and advise the Lords as a judicial body, though they have no voice in the decision. In fact, recourse to the advice of the Judges is absolute. Since the Judicature Acts, all the Judges of the High Court and the Court of Appeal are summoned to Parliament, but their advice has not been asked for since 1897, and having regard to the present judicial strength

of the House of Lords, it is most improbable that it will ever be asked again. Still, the former practice is in favour of Lord Darling's motion. Lord Parmoor, however, on behalf of the Government, saw no practical advantage in it, and other speakers saw a good deal of practical inconvenience—especially if the system was reciprocated and Ministers in the House of Lords could likewise attend and speak in the Commons. The House preferred to risk Lord Buckmaster's prophecy, based on "the history of every revolution which has broken down the social order of a great State," that reform, when it comes, will be too late.—*L.J.*, 1929, p. 70.

Discharge of a Petty Jury.—The discharge of a jury by Mr. Justice Humphreys at the Central Criminal Court on July 25, owing to one of their number having conversed with witnesses for the defence, did not probably occasion much surprise either within or beyond the confines of the legal profession. The duty of the jury to refrain from private communication with the witnesses in the case they are trying is well known; and the exercise by the Judge of his power to discharge a jury before verdict given is not seriously questioned to-day. But yet this power has not always been beyond dispute, and as Cockburn, C.J., said in *Reg.* v. *Charlesworth*, (1861) 31 L.J., M.C. at 28:—

"In no part of our procedure has the practice of the Courts more fluctuated than with reference to the question of the discharge of juries in criminal trials."—*L.J.*, 1929, p. 73.

Scrutton, L.J., Foretells.—Said Scrutton, L.J. (erroneously described in the evening press as a Law Lord), aptly enough on the eve of the Long Vacation, "The Courts may have to close down." And with rare responsiveness to the prophetic voice, the very next day they did. Whether it be due to trade depression or merchants' boycott, they look very much the same whether they are open or closed. There is nothing doing. Even the usual end-of-term spurt was a pitiful show. *The Times Reports*, which for some time had shrivelled into a meagre corner, on July 30 burgeoned and spread abroad almost to the fulness of the accustomed page. But what was it? On the left a murderer's unsuccessful appeal. Symbolically, a column of decrees *nisi* in the middle; and on the right, like the last rose of summer, the report of the rattling churns which annoyed and disturbed my old friend, Mr. Vanderpant, not once, but oftentimes in the watches of the Mayfair night.

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Yes; the Courts have closed down until October 12.—*L.J.*, 1929, p. 79.

Why the Courts are closed.—Indirectly, and as it were by innuendo, you will have noted that Scrutton, L.J., attributes the prevailing slackness in the legal trade, and its imminent liquidation, to one cause, and to one cause only: excessive costs, more especially excessive costs of counsel. "When I came to the Bar," said he, "a leader's fee—unless he were a super-luxury—was ten guineas, and two for the consultation." Let me see: when was Scrutton, L J., called to the Bar? In 1882. O-hey: but those were the days when tuppence would buy a mutchkin of English ale. Moreover, the twenty guinea fee was not unknown, even in those days, to the less luxurious leaders.

Now the matter which so stirred the Lord Justice was a small one of security for costs in a cause which had just avoided relegation to the County Court. In one defence the estimated costs were: leading counsel, 100 guineas; junior, 70; instructions on brief, 75.

> "Preposterous," said the Judge, "there may be leaders so good that clients will pay that sum for them, but to say you can't come into Court without paying 170 guineas to counsel and 70 guineas to solicitors is outrageous."—*L.J.*, 1929, p. 79.

Killing the Goose.—While no man would rejoice more ungrudgingly than I at the sight of a large fee on one's own brief, I think there is a vast deal of truth in the words of the Judge. Certain practitioners are and have been for some time engaged in killing the goose that lays the golden eggs. They are too greedy; they will take the uttermost in a minimum of time; and then they will move on, not greatly caring what may happen to our law and our surviving lawyers when they have had their turn.

All that will be left for those of us who remain will be the exhausted and egg-less carcase of the bird. A sad burial and a long farewell would be our portion.

> "If this were the standard"—*i.e.*, the 100, 70 and 75 guineas aforesaid—"of legal remuneration, the result would be that the Law Courts would be closed at a very early stage, because the costs would be so extravagant that ordinary people could not get justice at the Law Courts."

"But no ordinary person would ever go there for that." Thus spake a fool of a layman when, on Tuesday night, I referred to the incident.—*L.J.*, 1929, p. 79.

The Attorney-General's Salary.—Sir William Jowitt, speaking on July 26, at Preston, referred, says *The Times,* to attacks which had been made upon his receiving such a large salary as Attorney-General.

He said that he never remembered such protests against the salaries of Lord Birkenhead or Lord Hailsham. "At the same time," he said,

"I think the system is a wrong one. It is ridiculous that the Attorney-General should receive much more than the Prime Minister. It is absolutely insupportable Yet, strangely enough, for the last 200 years no Attorney-General has found that out before. If and when they alter that system they will certainly get no obstruction from me, but as long as that system goes on I do not see why a Labour man should be treated differently from a Tory."—*L.J.*, 1929, p. 84.

Simon's Speeches.—Yet let me not seem to display ignorance or presumption in any reference to Sir John Simon. I have before me a volume containing his Three Speeches (with appendices) on the General Strike, and there can be no doubt whatever that they are in form and substance among the very finest and most impressive utterances in the post-war Parliament. Of the three, the first was, in the nature of things, the foremost and the best. The later speeches were, for works of art, too defensive and explanatory. The first, defects and all, is probably, as a speech, the best and most typical he has ever made in the House.

Therein appears his love of an apt quotation, especially when it can be used to cap that of an opponent. He indicated the source of the quotation by Mr. Kirkwood, "Man, proud man, drest in a little brief authority." "It was the famous speech of Isabella in 'Measure for Measure' . . . . although an hon. gentleman below him thought it came from the poet Burns. . . . because he mistook the Doric accent in which the passage was declaimed for the well of English undefiled from which the orator drew his inspiration." And Sir John, viewing the Labour leaders, quoted from the same speech:

"O! it is excellent
To have a giant's strength, but it is tyrannous
To use it like a giant."—*L.J.*, 1929, p. 92.

Strikes, General and Just.—Probably that expressed the feelings of Sir Henry Slesser after his late encounters with the Liberal lawyer.

Astbury, J., whose retirement from the Bench is now regrettably near, occupies a high place in this book on the World's One and Only General Strike. To Sir John's contention that a General Strike was not a strike at all, Sir Henry Slesser (as he then was) observed that these legal propositions could only be finally decided by Judges. And pat, like a rabbit out of the hat of a conjuror, came a judgment of Mr. Justice Astbury that very morning, ready to the speaker's hand. (May 11, 1926).—*L J.*, 1929, p. 92.

Mixed Tribunals.—Since 1875 Egypt has also had the Mixed Tribunals, to which the consular jurisdiction in civil cases was transferred, and the present proposal is to give them also the jurisdiction still retained by the consular courts. Thus, while a foreigner will not have the protection of a Judge of his own nationality, his case will come before a Court composed mainly of Judges who are not Egyptian. The British Note which explains the proposed changes refers specifically to the two matters we have mentioned The extension of the criminal jurisdiction of the Mixed Tribunals will, it is stated, necessitate the preparation of a new Code of Criminal Procedure, and a check is to be kept by the Mixed Tribunals on fiscal legislation so as to ensure that it shall not inequitably discriminate against foreigners, including foreign companies. Each country concerned will have to consent separately to the abolition of its consular court, so that the change can only be effected gradually, and, while the Mixed Tribunals remain, Egypt, though nominally independent, will still be in a position of judicial inferiority. The Capitulations in Turkey were abolished by the Treaty of Lausanne of July, 1923, and in that country no safeguard such as that of the Mixed Tribunals remains. Prof. Pearce Higgins, in a note to the last edition of Hall's *International Law*, (1924), at p. 61, says: "Past experience of Turkish administration and judicial reforms does not suggest a hopeful view as regards the future position of foreigners in the matter of judicial administration." But perhaps things are turning out better than he anticipated —*L.J*, 1929, p. 98.

"Subject to Our Solicitors' Approval"—We have had a sufficiency of cases on the effect of inserting in an apparent agreement for the sale of land the formula "subject to formal contract," and we now know that these words prevent any contract arising even though a deposit is paid and a receipt given.

Of course, it cuts both ways, for either party may find that he has lost a bargain on which he was relying.

But in *Curtis Moffat, Ltd.* v. *Wheeler,* (1929) 2 Ch. 224, Mr. Justice Maugham has settled a doubt which still remained as to the effect of "subject to our solicitors' approval of the title." Are these words to be taken at their face value, or are they surplusage? In *Hussey* v. *Horn-Payne,* (8 Ch.D. 670), the Court of Appeal held that they were effective. When the purchaser puts them in he must, said Jessel, M.R., be taken to mean what he says; that is, to make it a condition that solicitors of his own selection shall approve the. title. Cotton, L.J., added the requirement of reasonableness. "If (the solicitor) acted reasonably and *bona fide* the Court would not enquire whether his objections were well founded in law." In the House of Lords, (4 App. Cases, 311) it became unnecessary to decide whether this view was right, but Lord Cairns, L.C., threw doubt upon it. "I am disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation." Mr. Justice Maugham, however, considered he was bound by the decision of the Court of Appeal—"and I may perhaps add that it is not altogether surprising to find a great lawyer, once in a way, mistaking the meaning of an uninstructed and perhaps inaccurate layman. "Lord Cairns has been placed at the head of Victorian lawyers, but in a matter of the use of words, as between him and the plain man, Mr. Justice Maugham awards the palm to the plain man. —*L.J.*, 1929, p. 98.

Sensational Murders.—The first three weeks of another Long Vacation have passed without any sensational murder mystery having appeared to occupy that part of the Press which is, at other times of the year, pre-occupied by litigious intelligence. It would be most convenient if our sensational murders, so far as these are necessary, could be scheduled to take place at this time of the year, not only for the better accommodation of Press news, but also for another and no less important and pressing need. Every lawyer amongst us is always expected by his acquaintances, and especially by the young and pretty ones, to be a mine of inner knowledge, or at least of technical explanations of the inquiries into these grisly events; and, unless they take place during the Vacation, the fact is that few of us have the time even to inform ourselves of the public information with which the young ladies are precisely acquainted. Murderers would, therefore, oblige by going about their business, and being

discovered at it, while we are on holiday. Only this consolation is to be derived from the fact that the Long Vacation is almost invariably a close season; whatever the secret relations between the trade and those who have to keep filled and make saleable our newspapers, it must be obvious that between the lawyers and the lawbreakers there is no working alliance. That an out-of-business-hours friendship maintains between the two professions may, no doubt, be assumed from the fact that they take, apparently, their holidays at the same time of the year, and possibly together.—*L.J.*, 1929, p. 113.

Appeals from the Irish Free State.—It is reported that the chief point to be raised by the Irish Free State at the Imperial Conference next spring is the question of appeals to the Privy Council. A preliminary conference of experts from the Mother Country and the Dominions will be held at London at an early date, and to this conference the Irish Free State will send a Minister with instructions to emphasise the importance of the Privy Council point, and to obtain as far as possible the sympathy and support of delegates from other Dominions. The Irish Free State Government, more than any other member of the British Commonwealth of Nations, not excluding South Africa, during its short existence, has adopted a critical and hostile attitude towards the right of appeal to the Judicial Committee. The contention appears to be that the right of appeal to the Privy Council is an anachronism and—much more important from the Irish point of view—constitutes a limitation of the sovereignty of a self-governing dominion.—*L.J.*, 1929, p. 126.

The Judicial Committee.—Into the question of sovereignty we need not now enter. Whether the Free State Government will go as far as to ask for total abolition, or only for a further limitation of appeals, remains to be seen. A correspondent of the *Morning Post* (16th instant), Mr. Denis Gwynn, says that total abolition is not asked for "at any rate for the present." If this is so, no question of principle now arises.

The extent to which appeals are allowed from the different members of the British Commonwealth and, where they are federal, from their constituent provinces, is a matter of bewildering variety. The notion that every subject of the Crown has a right of access to the justice of the Crown through the Privy Council has no basis in fact. In the case of the Dominions, as Lord Haldane said, it is a question of more and more, or

less and less, as they please. By the British North America Act, the Crown's prerogative was expressly reserved; but from the Federal High Court of Australia, appeals on constitutional questions can only be brought on the certificate of the High Court, and the Australia Constitution Act empowers the Commonwealth Parliament further to limit appeals, subject to the consent of the Crown. In South Africa the right of appeal from the provincial Courts was abolished by the South Africa Act, 1909, and appeals from the Appellate Division of the Supreme Court require the special leave of the Judicial Committee. Appeals from Ireland are based on the precedent of South Africa. Appeals as of right are abolished, and there can only be appeals by special leave. Thus the tendency is to close the gate of access to the Crown through the Judicial Committee save with the consent either of the Dominion Supreme Court or of the Committee itself. The further step of making a Dominion judicially independent will presumably be considered in connection with the present Irish proposal. This and other aspects of the matter we do not a present discuss.—*L.J.*, 1929, p. 126.

Medical Men and Subpoenas.—Judge Gwynne-James, who recently, at Bath County Court, fined a medical doctor two guineas for failing to obey a subpœna, called attention to a matter which is one of increasing difficulty not only for professional witnesses who are required to give evidence, but for solicitors whose duty it is to secure their attendance and their goodwill. The Judge mentioned two recent cases which had occurred on his Circuit where medical men refused to give evidence in Court on behalf of their patients unless they were paid special fees; in one the doctor demanded a fee of twenty guineas. The fact is that a medical witness is bound to attend on being served with a subpœna, and to be given his conduct money, with a fee of one guinea, which in special circumstances may be increased to a fee not exceeding five guineas. For failure to obey, the doctor is liable to fine and imprisonment for contempt of Court. There can be no doubt that this legal *obligator* operates with great hardship on members of the medical profession; especially since the increase in the number of running-down cases, where medical evidence is almost invariably required. It is equally certain that their attendance must be enforced, and that there is an appreciable difference in value between a willing and an unwilling witness. An increase in the fee allowable would not meet the difficulty. Far more important, in our

view, is the frequency with which doctors are summoned to attend Court at a time when the case cannot possibly be heard. A medical man is, in consequence, often kept waiting for a day or for days while his practice and his patients are suffering. The approximate timing of cases would effect a marked improvement, and this reform cannot be regarded as impracticable. Meanwhile, the doctors must remember that fine and imprisonment are greater evils than the vexatious delay which so often follows the act of obedience to a subpœna.—*L.J.*, 1929, p. 127.

Silence in Court.—Swearing in a new metropolitan magistrate recently a learned Judge is said to have advised him not to talk much on the bench. That wise Judges and Magistrates say very little is an old story; so is the advice "Never give reasons; your decisions will probably be right, but your reasons are sure to be wrong." While it is perfectly true that a too fluent tongue is dangerous in the occupant of the bench, likely to betray him into error or indiscretion, it is easy to over-estimate the wisdom of sphinx-like silence and inscrutability. Certainly, the Magistrate who constantly interrupts witnesses is sure to confuse them. If he keeps interposing and taking the case out of counsel's hands, he embarrasses him and spoils the conduct of his case. Moreover, if he talks too much, he is probably not listening and watching the demeanour of the witnesses as closely as he might. Nevertheless, the Magistrate who hardly ever breaks silence is not necessarily profoundly wise. Those who have the handling of a case are often helped a very great deal by a timely intervention, explaining a tentative opinion so as to encourage argument or to direct it to the essential points of the case. To have no sign at all from the bench from start to finish means that no risk can be taken by shortening the proceedings or restricting the arguments; whereas an intimation that the Magistrate regards certain matters as irrelevant or unimportant and desires the issues to be confined within certain limits, defines and lightens the task of the advocate or the litigant. Without it, he has not the faintest motion of what, if any, impression he is making. Indeed, he may almost be pardoned if he sometimes wonders whether he has the undivided attention of the bench Occasional interruptions help far more than they hinder, provided they are (as they would be, one may assume) both timely and courteous.—*L.J.*, 1929, p. 127.

Ostracism or Reinstatement.—Mr. Justice McCardie spoke a true word when he said, at a meeting of the Central Discharged Prisoners' Aid Society last week, that the law was never so merciless as society itself. For many of the difficulties he encounters in his task of re-establishing himself the released prisoner has to thank society rather than the law. So long as employers, fellow workmen, friends and neighbours offer the cold shoulder to a man because he has been in prison, the punishment of imprisonment will continue long after a man's release. It is, of course, a risk to employ, or to be friend, an ex-convict. But many employers can and do offer positions not involving trust to men who have been convicted of dishonesty; later on they may even be restored to positions of responsibility. The learned Judge said that he felt that there might be two great tragedies in a man's life; first, when the prison gates clashed behind him when he went in to serve his sentence; and, secondly, when they clashed behind him when he came out after serving his sentence. Then he stood at the gates without friends, money and character. Societies may do a great deal, we all know; but unless society backs them up with practical help as well as subscriptions, they are grievously handicapped. Ostracism is the most discouraging and embittering experience the discharge prisoner ever suffers; and as long as we are so foolish and illogical as to attach stigma to the imprisonment that is suffered to expiate the offence rather than to the offence itself (provided that it results in no more harm than a binding over!) so long will the uphill path of the ex-prisoner be almost impassable.—*S.J.*, 1929, p. 408.

The Lighter Side of the Law.—An old conveyancer, mentioned by Lord Campbell in one of those biographical collections which were wittily said to have added a new terror to death, is reported to have remarked, in answer to the question whether he did not find it exceedingly irksome to be continually poring over old abstracts and such like documents, that it would be wearisome were it not that every now and again he came across "a brilliant deed." The position is much the same with those whose lot it is to go through and appraise the papers set to candidates in legal examinations. Quite recently it fell to the writer of this paragraph to examine a large number of such papers; it was dull enough work for the most part, but he was greatly cheered by an answer to one of the questions. The question related to the liability of a married woman who had ordered furniture, for which, when delivered, she had refused to pay. The particular examinee gave it as his opinion that

the married lady was liable to pay the bill, and further, that in the event of not paying, she could be made a bankrupt, but that "capital punishment could not be enforced against her!" Whether this was intended as a piece of humour was not quite clear. Possibly, in the examinee's mind there was some confusion as to the kind of "execution" that might be levied in the case of a married woman, and so the mixing up "execution" with capital punishment induced the answer set out above. It was at least a safe one.—*S.J.*, 1929, p. 439.

The Use of Medical Titles.—The prosecution of Colonel Kynaston by the Royal College of Surgeons upon charges of "wilfully and falsely pretending to be a doctor of medicine," and of using the title "M.R.C.S. Eng." contrary to the Medical Acts, raises once again the question of the discipline of the medical profession. The first charge was dismissed by the magistrate, and the second was dealt with under the Probation of Offenders Act, the learned stipendiary expressing the view that the continued use of the letters M.R.C.S. by a member whose name had been removed from the register was illegal. If we may respectfully say so, these decisions seem to be founded upon strict common sense as well as law. Obviously it is not right for a medical man whose name has been removed from the membership of the Royal College of Surgeons (for whatever cause) should continue to use letters suggesting that he is still a member. But the other question—whether he may still call himself a "doctor" is more complex. The magistrate found there was no "wilful and false pretence," and the defendant, who appeared in person, claimed that as he still held the qualifying certificate of the Society of Apothecaries he was entitled to practise and to describe himself as a doctor of medicine. It will be interesting to see what, if any, further developments follow upon this case.—*S.J.*, 1929, p. 474.

Reckless Identification.—In *Hegdis v. Rose*, (1929) (*Times*, 23rd July), an important pronouncement was made by Mr. Justice Acton: "He was prepared to accept that, if a person were kept in custody, because of reckless identification, or identification in bad faith, by another person, an action for damages would lie." The jury in the particular instance found for the defendant, who is stated to have identified a dark man, with no gold tooth, as the accused, who had been described as "fair, clean shaven, slightly bald and with a gold tooth," a mistake which

indicates considerable carelessness. The real vice of identification in many cases is that the witness, instead of picking out the individual whom he recognises or believes he recognises as *the* man, picks out the individual in the group who most resembles the one the witness is seeking. It is a trick of the mind which needs careful guarding against, but it is the melancholy fact that the persons most liable to error are the very ones who are mentally incapable of attempting to check the processes by which they arrive at a conclusion. That there is a legal remedy available in extreme cases of negligent or reckless identification, is to the good, though there is the usual drawback that many of the offenders are not worth powder and shot.—*S.J.*, 1929, p. 489.

Tricksters?—The remarkable credulity of the public at large has been responsible for many small "shady" money-making schemes devised by adventurous characters. One of the latest ideas takes the form of a well-dressed masked man selling on the streets for six pence a sealed envelope said to contain a genuine bank-note and something else of value. The origin of this scheme can undoubtedly be traced to the offering for sale of genuine English £1 notes for six pence for a wager by a man on Westminster Bridge some time ago, and many who missed a golden opportunity on that occasion fall an easy prey to the non-genuine activities of his successors. Some indignation has occasionally been expressed when the "fraud" is disclosed, but the "business" has apparently developed sufficiently extensively to attract the attention of the police. At Bow-street Police Court on the 27th June a man was charged with attempting to obtain money by false pretences by the above methods. The envelopes in question contained an obsolete German mark-note and a racing tip which the vendor described respectively as "a genuine bank-note" and "something that might be worth pounds." The Magistrate, describing the case as a border line one, said that he believed that it was fraud, but he dealt with the charge as one of obstructing the pavement and imposed a fine of 40*s*. Actual or positive fraud has been held to include cases of the intentional and successful employment of any cunning, deception or artifice used to circumvent, cheat or deceive another, and there can be little doubt in the present case that the obviously untrue suggestion regarding a wager coupled with the "genuine bank-note" statement constitute a sufficient deception to merit the description of fraud. The loss of six pence in these

circumstances may be negligible to the majority of people, but protection should be afforded to those literally poor innocents who are not sufficiently intelligent to realise that one very rarely gets something, particularly a bank-note, for nothing.—*S.J.*, 1929, p. 505.

Student's Claim against Professor.—An unusual case was tried recently at Edinburgh when Lewis Coutts, formerly a student at Aberdeen University, appealed from an interlocutor of the Sheriff of Aberdeen. Coutts had claimed £5,000 damages from Professor Jack, of the chair of English Literature at Aberdeen on the ground that the Professor had wrongfully refused him permission to attend the honours English class at Aberdeen. The Sheriff decided in favour of the professor, and the Lord President, in dismissing the appeal, said that an attack upon the professor based upon malice or oblique motive failed for want of proof, and that it was also impossible to hold that the plaintiff's academic career was brought to a close by Professor Jack's declining to allow him to attend his class. The reasons for the professor's action are not set out, but the effect of such exclusion would obviously vary, in similar cases, with the type of university and the type of lecture. In the ancient universities lectures are not usually compulsory Many undergraduates never attend lectures at all and yet attain the highest honours. In the case of certain lecturers it is said to be more comfortable to sleep in one's bed than in the lecture room. In the case of others their lectures are only attended because they happen to be examiners. While it is not for a moment suggested that the average lecture is of this type, nevertheless it could hardly be said that a student who was excluded from any particular course of lectures at one of these foundations suffered any *serious* disability as regards his examinations. Far otherwise would it be at one of the newer universities, where lectures are generally compulsory and where the examination papers are often based entirely on them. At one of such universities exclusion from a course of lectures might well prejudice a student in his whole academic career. In any case to estimate the measure of damages would be a matter of extreme difficulty. —*S J.*, 1929, p. 505.

Sun-bathing and the Law.—It is recorded in a newspaper that, during the recent tropical weather, two young women took a sun-bath on Exmoor near a public road, with, as photographers

might say, 100 per cent. of exposure, treating the curiosity and the criticisms of the wayfarers with equal indifference. The moral and the theological aspects of the matter are hardly subjects for these pages, but the question whether these young persons offended against the law is within our province. There is no doubt, of course, that indecent exposure is a common law offence in a male, and that it can be committed without any evil intent. Thus in *R.* v. *Crunden,* (1809) 2 Camp. 89, the defendant stripped and bathed off the shore at Brighton, in a place where he had often done so before, but houses had recently been erected near by. No motive was imputed to him other than the salutary one of a pleasant dip. On prosecution, his counsel pleaded, with some ingenuity, that, if his bathing was a nuisance, the new inhabitants had come to it and must put up with it. M'Donald, C.B., however, soon dealt with this specious argument and held that, whatever place becomes the habitation of civilized man, the laws of decency must there be enforced. In accordance with the justice of the case, therefore, the defendant was bound over. There does not, however, appear to be any record of a woman or girl being prosecuted for such an offence (unless in the company of a man), which may be a criminal act for male persons only. If this is the right view, there is an analogy in section 11 of the Criminal Law Amendment Act, 1885, under which males only may be indited for gross indecency. As to statutory law, section 28 of the Town Police Clauses Act penalises every person who, to the annoyance, etc., is wilfully guilty of indecent exposure, and section 29 penalises indecent behaviour without qualification. There can be no reasonable doubt that these prohibitions would apply to both sexes, but the Act can hardly run on Exmoor. The indecent exposure punished by section 4 of the Vagrancy Act, 1824, "with intent to insult any female," is obviously a masculine offence only. Possibly, therefore, these young women were within their rights on Exmoor, though they certainly could not behave in such a manner in any park or recreation ground with properly framed regulations. It might be a nice question whether a regulation as to decency would be *intra vires* under the L.P.A., 1925, section 193 (1) (*b*). The public ought, of course, to have every reasonable opportunity for sun-bathing, now its healthful effects are known, but these are compatible with exposure which is deemed decent in the twentieth century (whatever might have been the case in the nineteenth) and the law should be framed accordingly.—*S.J.*, 1929, p. 505.

The Nationality of Wives.—Some of the difficulties of Englishmen who marry foreigners and tire of them are discussed on p. 477, *ante*. These turn on our rigid rule that a woman's domicile is that of her husband, but difficulties also occur in respect of nationality. Thus, by section 10 of the British Nationality and Status of Aliens Act, 1914, the wife of a British subject is deemed to be a British subject and the wife of an alien is deemed to be an alien. But it has been pointed out that a British girl who marries an American does not thereby automatically acquire American nationality by American Law, and, therefore, is repudiated by both States. On the other hand, an American girl who marries a British husband retains her American allegiance by American Law, but also becomes a British subject under section 10, *supra*. The anomalies which may arise in this way are discussed in *Stoeck* v. *Public Trustee*, (1921) 2 Ch. 67, in which Russell, J., held that the condition of "statelessness" or "*sans patrie*" is recognised by our law. A stateless person would be an alien, but one who, presumably, so long as he remained in that condition, could not be an alien enemy, though, on the other hand, he could not have such privileges as might be accorded a definite national. A double allegiance would be both awkward and dangerous in case of warfare between the respective states claiming a particular subject; if there were such persons in England during the war, they were, no doubt, interned, a course which made for the mutual safety of the nation and the individual. The loss of British nationality when a girl marries a foreigner has been represented as a hardship cast on a woman by the "man-made law," but, save in the unhappy event of a war between Great Britain and the husband's country, it is difficult to conceive of much hardship arising. Still, the rules that a woman's nationality and domicile should rigidly follow that of her husband hardly accord with modern notions of a woman's place in matrimony, and need reconsideration. The difficulty is, of course, that a revision of our own laws in this direction would merely add to the conflict of laws unless other nations moved also in the same direction. The whole matter suggests some spade-work at Geneva, to the end that the rules of domicile and allegiance should be uniform throughout the civilised world.—*S.J.*, 1929, p. 506.

Motor Car as a Dangerous Thing.—Rather more than twenty years' ago Lord (then Mr. Justice) Darling gave it as

his opinion in *Chichester Corporation* v. *Foster*, (1906) 1 K.B. 167, that, strictly speaking, nothing can be called "a dangerous thing," except, perhaps, in the expression used by Mr. Pope in regard to "a little learning." The allusion was apt and the observation witty, but the lapse of twenty years and the extraordinary increase on the roads during that time of the motor car, rather suggests that this now almost too-popular vehicle must be collocated with "a little learning," so as to be properly described as "a dangerous thing." Certainly the long list of road accidents chronicled day by day in the newspapers points in this direction, but it is not only when in motion that the motor car has the property of being dangerous, it may have it likewise when supposed to be safely stabled in its garage. This is well illustrated by a recent case in Alberta: *Brody's Limited* v. *Canadian National Railway Company*, (1929) 1 W.W.R. 715. There the plaintiff occupied the upper part of a building the groundfloor of which was used by the defendant as a garage. As a result of the act of the defendant's servant in cleaning with gasoline the engine of one of the motor trucks while the truck was inside the building, and while the engine was warm, without disconnecting the engine from the battery, a fire broke out which damaged the plaintiff's goods and fixtures in the upper part of the building. On a claim by the plaintiff for the damage occasioned to his goods, it was held that the defendant was liable both on the ground of negligence and under the rule in *Rylands* v *Fletcher*, (1866) L.R. 3 H.L. 330, inasmuch as the motor truck, in the condition in which it was while being cleaned, was a dangerous thing within the meaning of the rule in that famous case, which, it will be remembered, lays it down that if a person brings upon his land anything which would not naturally come there, and which is in itself dangerous, and may become mischievous if not kept under proper control, he will be liable in damages for any mischief thereby occasioned, although he may have acted without personal wilfulness or negligence.—*S.J.*, 1929, p. 506.

My Friend is too Technical.—The word "technical" has attained a peculiar significance in the legal profession. It has almost become synonymous with bad form; a term of reproach damning with its faint praise. The umpire who will give a good bat out l.b.w. without a tremor, the engineer working to incredible fractions of an inch, the surgeon insisting on making certain that he has removed all his instruments at the conclusion of an operation, all these may go their way *sans*.

peur et sans reproche. But the advocate who is ever ready to protest against the first laxity he detects, who is always confronting his harassed opponents with unsuspected cases and unheard-of *dicta* soon becomes as unpopular as Tom Brown's friend Arthur, who did Latin prep. because he loved it. In some cases, the criticism implied in the word is just. Points without substance waste time and take the attention of the court from the real issues. Wasting time and distracting attention are both bad faults; but they are more often committed by those who are not really technical at all, those whom vanity is forever forcing to their feet and who imagine that unless they are up and talking they will pass unnoticed. Often an opponent is accused of technicality simply because he has a better knowledge of the law and is resolute to put it to good use. Every submission he advances is technical, and this is not to be wondered at, because very much of the law is technical. A particular case may be highly technical, but ought it for that reason to be avoided as we avoid awkward topics of conversation in our daily life? It may very well be that a dozen or more judges, to say nothing of advocates, spent a good deal of time and learning in worrying it out. If only in courtesy to them, to say nothing of the position case-law is recognised as occupying in our legal system, the disliked decision ought to be brought to notice. Courts owe more to the "technical" lawyer than they are generally disposed to admit. How many times has he not with becoming humility reminded tribunals of decisions of which they had never heard? How often has he not construed statutes which until his masterly hand tore aside the veil had been meaningless? And often the moment he walks into court, he changes a slovenly happy-go-lucky atmosphere into one of alertness. No one wants to risk a blunder when so discerning a critic is looking on.—*S.J.*, 1929, p. 533.

The Appearance of Justice.—The Lord Chief Justice in *R. v. Sussex, JJ., ex parte McCarthy,* (1924) 1 K.B. 256; 68 Sol. J., 253, gave utterance to a profound truth too often overlooked. He said, "There is no doubt that it is not merely of some importance, but of fundamental importance, that justice should not only be done, but be manifestly and undoubtedly seem to be done"; and he, and other judges, have frequently emphasised this importance. There are two types of mind which approach questions of bias or suspicion of bias from entirely different standpoints. One set of people will act if not actually forbidden by

law; the others consider that the mere fact that a question is raised should restrain them from acting. The latter, while, perhaps, going too far on occasion, are undoubtedly on sounder ground. It is indeed difficult to understand the mind which, uninfluenced by expectation of personal advantage, will nevertheless insist on adjudicating or taking a judicial part in proceedings where their fellows cannot unfairly be disposed to regard them as being unduly biased. The same considerations arise upon applications for change of venue, which ought to be regarded benevolently. It is pleasing to see an American court changing the venue on the ground that sixteen persons charged with conspiracy to murder a chief of police could hardly get a trial in the normal course which would have "every appearance of fairness", though it might in fact be a fair trial. This decision shows a thorough grasp of the principles upon which Anglo-American jurisprudence has been laboriously constructed by generations of lawyers intent on producing confidence in the administration of justice.—*S.J.*, 1929, p. 534.

Legal Research and the Judiciary.—A pleasant story has come down to us of a barrister entering the court with a great bundle of books, which, on seeing, a quizzical lay friend asked what they were for, as he had assumed that all counsel knew the law. "So we do", was the witty reply, "these books are for the judges". To the lay mind it appears paradoxical that the eminent men whom the State places on the bench to administer justice have to be primed with the law on each subject that is brought before them by the citation of the relevant authorities; but judges, even the most distinguished, are human and have not in their minds a ready-made storehouse of law from which they can draw rules for the decision of every dispute that arises. It has indeed been whispered that occasionally some judgment, in which the law is set out with a masterly cogency of reasoning and lucidity of statement, has been vicariously prepared, the reputed author having invoked the aid of another to grapple with the difficulties of the question involved; but in this country we have not gone the length of advocating legal research specially for the benefit of our judges, as has recently been done by a member of the New York bar, who, in a letter read at a founders' day dinner of the Lawyers' Club of the University of Michigan, suggested the giving of "free, confidential legal advice to judges, high and low, as one of the directions which legal research should take". It seems a somewhat novel development

of the function of the legal researcher, whom we have hitherto regarded as one who explored the early history of law and procedure with the object of elucidating what is obscure in the system of to-day, and not as one who answered legal queries for the judiciary. But, after all, a judge may obtain his information as best he can, and possibly there may be scope for this new form of research.—*S.J.*, 1929, p. 547.

Litter.—To fine a man for dropping a few omnibus tickets in the street, or for throwing away nutshells in a park, seems at first sight a piece of grandmotherly interference. If, however, hundreds of thousands of people every day litter the public streets and parks, and if every week-end beauty spots all over the country are defiled by the rubbish of innumerable untidy picnic parties, the evil assumes large proportions and it becomes clear that the many who contribute a little to the large sum-total must be taught somehow that this new national fault is to be conquered. Educating children and appealing to adults may have some effect, but apparently bye-laws and fines are also necessary. The Home Office has lately been considering the framing of a model bye-law for the use of local authorities. In the enforcement of such bye-laws it is necessary to preserve a sense of proportion and reality. Penalties need hardly be severe for small acts of thoughtlessness, but, equally, prosecutions should not be ridiculed as vexatious. Paraphrasing a famous dictum, magistrates might well say: "You are not fined for throwing down a little paper, but in order that others may not throw down paper."—*S.J.*, 1929, p. 560.

Very Mixed Bathing.—Many of us can remember when bathing was a matter of considerable restriction. Without a machine or a tent, it was usually allowed before 8 A.M. or after 8 P.M., and it was never mixed. Bye-laws were strictly enforced; indeed, very few people had the temerity to disregard them. We should be sorry to go all the way back; mixed bathing, in the friendly, family party style, is the best bathing of all. But surely there might still be limits! Seaside and riverside at this season of the year are abandoning, or so it seems in many parts, every restriction as to time and place. What used to be quiet little haunts are now noisy rendezvous for bathers of both sexes who dress and undress with little regard for passers-by, and who often spend a great deal of time ashore in costumes which, while decent enough for the actual bathe, are quite inadequate

for prolonged use on land. We think that without being either prudish or offensive, authorities might insist on a little more observance of restraint. Talking of bathing (one may surely digress a little in the Long Vacation), the Marlborough Street magistrate expressed considerable surprise upon learning last week that a woman police constable was on duty in Hyde Park guarding the approach to the boys' bathing place and warning off women who approached too closely. He, not unnaturally, but perhaps not quite seriously, suggested that sex equality demanded that a male officer should be told off to guard the girls' bathing place. It certainly seems very mixed.—*S.J.*, 1929, p. 561.

Marriages of Convenience.—Magistrates dealing with matrimonial cases involving desertion or neglect to maintain occasionally find themselves confronted with legal problems of some difficulty, and the common, airy disposal of such cases as matters of common sense involving no law is likely to lead to some bad mistakes. For example, agreements to live apart, made after marriage, have often to be considered as having an effect upon the question of alleged desertion. These sometimes present difficulty; but, at all events, it is beyond doubt that such an agreement may be valid. Less common, and, therefore, more likely to lead to error, is the case of an agreement made before marriage. The Willesden bench had an instance of this kind last week, when the husband produced a document which he said his wife signed before marriage in order to make the marriage conditional. It read: "I agree that my marriage is purely formal, to assist me through the birth of my child, after which I agree to annul the said marriage." The chairman rightly pointed out that individuals had no power to annul marriages. The wife denied signing the document, and apparently the magistrates believed her. The husband was ordered to pay maintenance for his wife and child. Furthermore, it may be pointed out that even if a woman did sign such a document before marriage, it would clearly be invalid as being contrary to public policy. Couples who have tried living together and made a failure of it are allowed to make lawful agreements to live apart; but any such agreement made before marriage would be of no effect whatever.—*S.J.*, 1929, p. 561.

BOOK REVIEWS.

THE TRIAL OF JEAN PIERRE VAQUIER. Notable British Trials Series. Published by Messrs. Butterworth & Co. (India), Ltd. Price Rs. 6-8-0.

As in many other cases of this kind, here also a woman was the cause of the murder of Mr. Alfred Poynter Jones by Jean Pierre Vaquier who was passionately in love with the former's wife. The story of the infatuation of the Frenchman for Mrs. Jones and the consequent illicit connections he had with her have been narrated with all the details sufficient to make the introduction to this volume gratifying the avidity of a reader of romance. The tragic end of Mr. Jones resulting from poison he drank from a bottle which contained strychnine, is really moving. The prosecution, ably conducted by Sir Patrick Hastings, K.C., the Attorney-General, leaves nothing unsaid or undone in making out that the accused was entirely responsible for that monstrous act. The defence by Sir Henry Curtis Bennet, K.C., impresses us how much he had to contend against a good deal of strong evidence for the prosecution. The charge to the Jury of Justice Avery clearly shows us how many are the circumstances which go to prove the case against the man in the box. This volume is, of course, a good addition to the Trials Series.—*K.C.*

THE CODE OF CRIMINAL PROCEDURE, by Dinesh Chandra Roy, M.A., B.L., Advocate, High Court, Calcutta. Published by Messrs. Butterworth & Co., Ltd. Price Rs. 15.

We welcome this work from the pen of one who is familiar to us by his commentary on the "Indian Penal Code." One chief merit of the book under review is that the author has taken the trouble to give under each section the history of the law by noting the corresponding sections in the former Codes. The amendments are given prominence by being printed in italics and their effect is stated with clearness and precision. Reports of the Select Committee and Statement of Objects and Reasons have been freely quoted wherever useful. In the citation of case-law, the learned author has displayed nice discrimination. He has grouped all the relevant and leading cases under appropriate headings and has also critically examined them in the light of the statutory amendments.

The value of this work would have been considerably enhanced if Mr. Roy had taken some pains to give an accurate

text of the sections as amended up-to-date. There is no up-to-date Government Edition of the Criminal Procedure Code, the last edition having been brought up to September, 1923. Since then, several changes have been made by various enactments. It is unfortunate that the several of the amendments introduced since 1923 should have escaped the notice of the author, for example the amendments inserted by Act X of 1927 in S. 55 (1), cl. (6) and in the second proviso to S. 188; by Act VIII of 1925 in S. 98; by Act II of 1926 in S. 202; by Acts XXXII of 1925 and XXXIV of 1926 in sections 4, cl. (*j*), 266, 364 and 365; the addition of section 295-A by Act XXV of 1927 in Ss. 99-A and 196; the omission of the words "with the like sanction" in sub-section (1) of S. 269 by Act X of 1927; the insertion of cl. (*aa*) by Act XXIII of 1925 and addition of the words "or Air Force" in cl. (*g*) by S. 2, Schedule I of Act X of 1927; the substitution by Act VII of 1924 of the words "sub-section (2)" in sub-section (3) of S. 541; the substitution and addition by Act X of 1927 in S. 549; the substitution of "sixteen" for "fourteen" years by Act XVIII of 1924 in S. 552; and the addition of the words "sub-sec. (1)" after S. 562 by Act VII of 1924 in S. 564. Some of the amendments in Sch. II have also been left unnoticed, for example, the omission of S. 159 by Act XXXVII of 1925; the addition of S. 295-A by Act XXV of 1927; the addition to S. 376 by Act XXIX of 1925; and the repeal of Ss. 490 and 492 by Act III of 1925. In Schedule III, the repeal by Act XXXVII of 1925, of No. (16) under the ordinary powers of a Magistrate of the third class, and of Nos. 15 and 16 under the ordinary powers of a District Magistrate, have not been noted.

Perhaps such shortcomings as the above have to be overlooked as inevitable in a work of this magnitude. We have no doubt that the author has succeeded in his main aim, as stated in his Preface, of bringing out a work useful to the Profession. The get up and printing are attractive and the price is not high.—*M.A.K.*

THE LAW APPLICABLE TO KHOJAS AND CUTCHI MEMONS, by S. R. Dongerkery. Price As. 8.

This small pamphlet deals mainly with the question to what extent the rules of Hindu Law apply in the case of the Khojas and the Cutchi Memons and the grounds on which the rules have been applied to them. To avoid any confusion the learned writer had dealt with the case of Khojas and Cutchi Memons

separately in considering how far the rules of Hindu joint family law has been applied to each. The personal law applicable to these communities has been traced from the earliest decisions of the British Courts and the lucidity with which the basis of the application of certain parts of the Hindu Law to these communities has been stated will, we feel sure, remove some of the popular misconceptions underlying them. The author has also given the provisions of the Cutchi Memons Act of 1920 with subsequent amendments and has added his notes to the sections. We have no doubt that this short monograph will tend to a clear and correct understanding of the law on the subject.

LAW AND PROCEDURE IN EXECUTION AND MISCELLANEOUS MATTERS, by Messrs. Nirmal Kumar Sen, M.A., B.L. and Anil Kumar Das Gupta, B.L., 1929. Published by M. C. Sarkar & Sons. Price Rs. 4.

We are aware of only one other book dealing with the topic of Execution; and it was published some years back in Madras. The volume under review collects together the provisions of the Civil Procedure Code, the Indian Limitation Act, the Provincial Small Causes Courts Act and the Bengal Tenancy Act dealing with the execution of decrees and orders. The learned authors have given full commentaries on the provisions bringing the case-law thereon up-to-date. There are also chapters dealing with arbitration and miscellaneous matters before and after decree, such as arrest and attachment before judgment, injunctions and receivership, where the provisions of the Civil Procedure Code on these subjects have been given with commentaries. We hope that this book will be found useful to lawyers in their practice.

THE LEGAL PRACTITIONERS ACT, by Khitish Chandra Chakravarti, B.A., B.L., 3rd edition, 1929. Published by M. C. Sarkar & Sons. Price Rs. 3-8-0.

In this edition the learned author has thoroughly revised and brought up-to-date his commentaries on the Legal Practitioners Act. The case-law has been noticed down to July of this year. The usefulness of the book can be judged from the fact that the author has also given all the prior Legal Practitioners Acts and the rules made by the various High Courts as well as the Bar Councils Act of 1926 with its later amendments.

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BURDEN OF PROOF IN ACTIONS FOR MALICIOUS PROSECUTION.

In these days of proverbial conflict of decisions, it is indeed a relief to find unanimity of judicial opinion on even a single question of law. But it is due to an irony of fate that certain time-honoured propositions of doubtful soundness continue to rule the legal world, with unquestioned authority, while others obviously correct are time and again doubted. It seems to me that the law as to the burden of proof in actions for malicious prosecutions requires revision and the purpose of this article is to draw the attention of the Bench and the Bar to that need.

It was always enunciated in the following familiar terms: "In an action for malicious prosecution, the plaintiff has to prove, that he was innocent of the charge upon which he was tried, and that the prosecution was instituted against him without any reasonable or probable cause." I have not herein included certain minor points, which also the plaintiff has to prove, as they are not necessary for the purpose of this discussion. It is somewhat perplexing to find out, how the doctrine that the plaintiff must prove his innocence was evolved at all. Recently the Privy Council declared that the proposition of law "that the plaintiff must prove that he was innocent of the charge" was an erroneous one. (*Balbhaddar* v. *Badri Sah.*[1]) As suggested by their Lordships, the erroneous view should have arisen from, and continued to rest on, a confusion of pleadings with proof. In cases where the plaintiff had not been formally discharged or acquitted, and the prosecutions had ended in his favour other-

1 (1926) 51 M.L.J 42 (P.C)

wise—by the Crown entering a Noble Prosequi for instance—it is usual and natural for him to aver that he is innocent of the charge laid at his doors. So universal and invariable had the practice of making such an averment become, that practitioners and Judges considered that it was incumbent on the plaintiff to prove it, to entitle him to any relief. In the English Law, the plaintiff was only required to prove "that the proceedings complained of terminated in his favour." Vide *Basebe* v. *Matthews.*[2] If the proceedings complained of are, from their nature, such as could not so terminate, the plaintiff is not even required to prove "that they terminated in his favour." Vide *Steward* v. *Gromett*[3] and *R.* v. *Doherty.*[4] In the recent Privy Council case *Balbhaddar* v. *Badri Sah*[1] Viscount Dunedin, who delivered the judgment for the Board, has said as follows:—

"Proposition 2, as stated, is quite erroneous. (Proposition 2 referred to is this: 'In an action for malicious prosecution the plaintiff has to prove that he is innocent of the charge'). It should be 'that the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating'. This phraseology may be found in the judgment of Montague Smith, J., in *Basebe* v. *Matthews*[2]". This Privy Council decision may be taken to have cleared the confusion of thought and the error of view that prevailed as regards one of the two aspects taken up for discussion.

About the other one, unfortunately, a large measure of inconvenience prevails both here and in England. But whereas the English Law appreciates the difficulties and inconveniences of the law, as it is propounded, the Indian Law does not. The rule as generally enunciated is "that the plaintiff must prove that the prosecution was instituted without reasonable or probable cause." Let us examine the position minutely. The criminal proceeding is started either on facts within the personal knowledge of the complainant or on information conveyed to him by persons with personal knowledge of such facts. In the former case, the only question for the Court to decide will be whether the charge was true or false, and there is no room for the application of the theory of "reasonable and proper cause." (Let me make myself clear. *A* prosecutes *B* alleging that he saw *B* steal and the prosecution terminates in *B's* favour. When *B* sues *A* for damages for malicious prosecution, the simple and

1 (1926) 51 M.L.J. 42 (P C).
2 (1867) L.R. 2 C.P 684 · 16 L T. 417.
3. (1859) 7 C.B. (N S) 191
4 (1810) 13 East 171

real question for the Court to decide will be whether *B* committed theft as alleged by *A* or not. The finding of the Criminal Court, though conclusive for the purpose of showing that the prosecution has terminated in *B's* favour, is not binding on the Civil Courts which have to hear the evidence and arrive at their own findings as to the truth or falsity of the charge.) This aspect is laid down in *Shubrati* v. *Shamsuddin*[5] and in *Radhe Lal* v. *Munnoo*.[6] In the latter case Sir George Knox, following the case in *Hira Lal* v. *Bandhu Bhagat*,[7] held that "where the charge is one which must have been true or false to the defendant's knowledge, and in which there could be no mistake on his part, no question of reasonable and probable cause arises." In the former case Justice Sulaiman held, following *Hira Lal* v. *Bandhu Bhagat*[7] and *Radhe Lal* v. *Munnoo*[6] as follows:—"If, as in the present case, the defendant pleads that his complaint was true and leads evidence to substantiate it, the question of truth or falsity of the complaint may arise at the instance of the defendant. And when such facts are professed to be within the knowledge of the defendant, the question of the truth or falsity of the complaint may also determine the question of want of reasonable and probable cause."

But, where the charge is laid on facts not within the complainant's knowledge, but communicated to him by informants, he cannot of course be expected to vouch for the truth of the facts alleged, though he ought to satisfy the Court that on the information furnished to him he acted *bona fide*, and as any man of ordinary prudence would have done. He ought to lay on the table the information he had and the existence of circumstances justifying the institution of the complaint. It is not enough if at best he has only reason to suspect the plaintiff. (*Busst* v. *Gibbons*[8] followed in *Ahmedbhai* v. *Framji Edulji*[9]) That means, he is expected to make due and full enquiries and satisfy himself about the truth of the charge he intends to formulate. In such cases, the question for adjudication will not be whether the charge is true or not, but only whether the defendant had reasonable and probable cause to institute the criminal proceedings in question.

5. (1928) I.L.R 50 A 713
6. (1913) 18 I.C. 280
7 A W N. (1889) 189
8 (1861) 30 L.J. Ex 75
9 (1903) I.L.R. 28 B 226

In both these cases, it would seem obvious, that the defendant must prove, that the charge is true or that he had reasonable and probable cause to institute the proceedings But, unfortunately, the Courts have always thrown the burden of proof on the plaintiff in both the cases. This practice, founded on case-law, is a serious invasion of natural rights, and a negation of well-recognised rules of evidence. It is always embarrassing to the practitioners and the Judges who have simply to follow the law as it is. The issue on this head is invariably in the following form:—"Was the proceeding instituted against plaintiff without reasonable and probable cause." It is cast in that form on the basis of authorities too numerous to mention which lay down that the plaintiff must prove that the prosecution was instituted without reasonable and probable cause.

When the plaintiff is called upon to prove either that the charge is false or that defendant had no reasonable and probable cause to initiate the proceedings, he is called upon to do the impossible, which I submit, is an invasion of natural rights When he is called upon to prove that he did not steal or assault, he is called upon to prove a negative. It is a well-known rule of evidence that the negative does not admit of direct and simple proof of which the affirmative is capable, and that he who avers a positive statement of facts must prove those facts. Does it not seem obvious that *A* who alleges that he saw *B* steal should alone prove that averment, because it is within his special knowledge, and *B* should not be called upon to lead evidence in the first instance that he did not. Sections 101, 103 and 106 of the Evidence Act may be usefully referred to Similarly again, when the question is whether the defendant had reasonable and probable cause, the only person who can swear to the definite facts and circumstances justifying the proceeding is the defendant. For reasons mentioned above, the plaintiff cannot be expected to lead evidence about facts and things within the personal knowledge of the defendant only. Apart from these two points of view, one is inclined to ask why the law as to burden of proof in actions for malicious prosecution should in any way differ from the law governing other actions. I can perfectly understand a special rule of evidence shifting the burden of proof in cases where for one reason or other presumptions exist. Is it possible to predicate that in an action for malicious prosecution there is a presumption to start with, that the plaintiff is guilty of the charge he was prosecuted for or that the proceeding must have been instituted with reasonable and probable cause? It is not.

It is an elementary rule of jurisprudence that everybody should be presumed to be innocent unless and until the contrary is proved and therefore there is no justification whatever for throwing the initial burden on the plaintiff. In cases where the complaint is filed on information, no presumption that it was filed with reasonable and probable cause will arise either. Presumption of good faith exists only in favour of officers and official acts and not in favour of the private transactions of other individuals.

The plaintiff is thus placed in a very perplexing situation. He realises he is called upon to do the impossible. He feels the injustice done to him by the malicious prosecution and the absolute necessity to seek reparation in a Court of Law. All that he can do, he does. He enters the witness box and swears about his innocence and challenges the other side to rebut his evidence. In practice, however, Judges have to, and do rest their findings on the evidence led by the defendant. In addition to the initial awkwardness to which the plaintiff is thus exposed, he is also made the target of attack in cross-examination, when the defendant's counsel can easily fling dirt at his character, honesty, reputation, etc. Very often, the innocent plaintiff easily survives the imputations. But all this need not be if the law were what it ought to be. Justly realising the extremely doubtful and flimsy character of the rule requiring the plaintiff to prove the above facts, it is laid down as follows:—"The plaintiff in proving the absence of reasonable and probable cause has to prove a negative and in general need only give slight evidence of such absence." (*Cotton* v. *James*[10] and *Taylor* v. *Williams*[11]). Why, I ask, should one respect a rule which is admittedly unsound on principle and difficult in practice, unless it be on the ground of *stare decisis*. In a matter of mere practice as to evidence, there can be no question of *stare decisis* either. We have only to hope that some courageous Judge will boldly expose the fallacy of the existing rule, and revise the law as to burden of proof in actions for malicious prosecutions.

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10. (1830) 1 B & Ad. 128
11. (1831) 2 B. & Ad. 845, 857.

SUMMARY OF ENGLISH CASES.

STEPHEN *v.* COOPER, (1929) A.C. 570.

Workmen's compensation—Driver of a two horse mower for cutting corn—Attempting to refix a loosened chain—Workman abandoning the proper procedure and following a dangerous course—Omitting to put the cutting blade out of gear—Horses bolting off—Accident to workman—"Added peril" or "out of and in the course of employment."

A farm servant who was working as a harvest hand was engaged in driving a two horse mower for cutting corn. While driving the mower, a chain hooked to the backband of one of the horses became unhooked and had to be rehooked. The servant without putting the cutting blade out of gear walked along the sloping pole balancing himself as he went. The horses suddenly started forward and the servant losing balance fell on the blade and was permanently injured. The proper method of refixing the chain was not followed by him but this dangerous course was taken.

Held, the injury was sustained by an accident caused by an "added peril" to which the workman exposed himself by his own conduct and was not due to an accident arising out of his employment. The question in all these cases is whether the course taken by the workman was prompted by his own indolence or purely for his own convenience, and not in the interests of the work, or whether it was part of the injured workman's employment to hazard, to suffer, or to do that which caused the injury.

Lancashire and Yorkshire Ry. Co. v. *Highley,* (1917) A.C. 352 followed.

Doctrine of "added peril" discussed.

In re RAINE. TYERMAN *v.* STANSFIELD, (1929) 1 Ch. 716.

Will—Pecuniary legacies to godchildren contingent on their attaining 21—No provision for payment of interest on legacies towards maintenance—If the intermediate interest can be paid towards maintenance—Testator not in loco parentis *to legatee.*

By a will, a testatrix gave certain pecuniary legacies to her godchildren if and when they should attain the age of 21 years. One child was 9 years and another 14 years of age at the testatrix's death. The question arose if the income arising

from the contingent legacies could be paid towards the maintenance of the children. The will contained no express power of maintenance.

Held, the Law of Property Act does not deal with pecuniary legacies and therefore the law prior to the Act alone applied. According to it, the legacy will bear interest for maintenance if the testator stood in *loco parentis* to the infant. But a contingent legacy to an infant towards whom the testator does not stand in *loco parentis* and which is not directed to be set apart for the benefit of the infant bears no interest either for maintenance or otherwise until it vests.

In re Boulter, (1918) 2 Ch. 40 followed.

In re Moody, (1895) 1 Ch. 101 distinguished.

In re GOOCH. GOOCH *v.* GOOCH, (1929) 1 Ch. 740.

Will—Codicil—Settlement prior to will and codicil—Codicil referring to the settlement and directing the fund under the codicil to be held on the same Trusts as settlement so far as then applicable—Settlement varied by Divorce Court—If the codicil settlement also varied.

By his will, a testator gave his residuary estate to trustees in trust for his children who should attain the age of 25 years. By a later codicil, he declared that the share of his son Eric should be held, as to a moiety thereof in trust to pay and make over the same to the trustees for the time being of a marriage settlement, dated September 23, 1916, to be held by them upon the trust of that settlement "so far as the same should be then applicable and capable of taking effect." Under that settlement, a fund was vested in trustees to Eric for life and on his death to his wife *G* during widowhood and to Eric's children after them. After the testator's death, Eric's marriage with *G* was dissolved and the settlement of 1916 varied by Court giving *G* an immediate life-interest and the question arose if it varied also the trust under the will referring to the settlement.

Held, to construe the will so, will be not to give effect to the intention either of the Court or of the parties to that order. The effect of the codicil is not to put the will fund into the settlement so that from and after the testatrix's death every change in the beneficial interest in the fund originally settled will necessarily be accompanied by a corresponding change in

the beneficial interest in the fund, which is added to the settlement fund by the codicil.

In re Campbell's Trusts, (1922) 1 Ch. 551 followed.

COTTER *v.* NATIONAL UNION OF SEAMEN, (1929) 2 Ch. 58: 98 L.J. Ch. 323.

Trade Union—Resolutions intra vires—*Action against the Union by a few members thereof to restrain the Union from acting on the resolutions—Resolutions contended to be invalid on account of some irregularities—Action if maintainable by individual members.*

Some members of the respondent Trade Union brought an action to restrain the Union from carrying into effect a resolution passed by the Union at its general meeting to lend without interest £10,000 to another non-political Union. The grounds were: (1) its being *ultra vires,* and (2) irregularities in the meeting.

Held by the Court of Appeal affirming Romer, J., that the grant of the loan was *intra vires* and as for the irregularities, they were mere matters of internal management of the company which do not give a right to individual members of the company to come in their individual characters to seek to put an end to those proceedings. The rule in *Foss* v. *Harbottle* (2 Hare, 461) that if an act is *intra vires* the corporation, and therefore one which could be sanctioned by the majority of the corporators properly assembled in general meeting, the Court will not entertain any proceedings against that act unless when brought by a majority of the members, applies to trade unions also inasmuch as a registered trade union is a legal entity like other corporations, notwithstanding the fact that by S. 8, Trade Unions Act, 1871, the estate of the Union is vested in the Union for not merely the "benefit of the Trade Union" but of the members thereof also.

In re SMALLEY. SMALLEY *v.* SCOTTON, (1929) 2 Ch. 112.

Will—Construction of—Bequest "unto my wife Eliza Ann Smalley"—Lawful wife Mary Ann Smalley—Bigamous marriage of testator with Eliza Ann Mercer—Latter known in neighbourhood by repute as his wife—Testator's intention.

A testator (Arthur Smalley) by his will gave all his possessions to "my wife Eliza Ann Smalley." He had a lawful

wife and a false wife by a bigamous marriage, one not known to the other. The testator was living with the bigamous wife. The will was produced by her as having been given to her.

Eve, J., held that the gift to "my wife" was sufficient to identify the woman as his lawful wife and evidence of intention was not admissible.

Held, by the Court of Appeal reversing Eve, J., that the word "wife" can be used in the secondary sense to include a wife by repute. Neither claimant answers to the description strictly and therefore the surrounding circumstances can be looked at to ascertain the true intention.

Doe v. *Rouse,* (1848) 5 C.B. 422 applied.

REX *v.* HUNDINGDON CONFIRMING AUTHORITY, (1929) 1 K.B. 698: 98 L.J.K.B. 331.

Licensing—Confirming Authority—First decision to issue license unconditional—Alteration at a subsequent meeting pursuant to Licensing Justices' decision—If parties must be heard again—Proceedings if judicial.

On the application for a new license to certain premises in the county, the Licensing Justices decided to grant a license unconditionally after hearing both parties, but the Confirming Authority added two conditions to the grant of the license. The Licensing Justices accepted only one of the conditions and the Confirming Authority thereupon at a later meeting confirmed the license subject to that condition. But no notice was given of the later meeting to the interested parties nor were they heard on the conditional issue of the license.

Held (by Lord Hewart, C.J., and Acton, J., Avory, J., dissenting), that the Confirming Authority were not bound to hear the parties again, they having heard what all the parties had to say in the first instance; nor does the fact that some members who heard in the first instance were absent on the second occasion invalidate the proceeding inasmuch as a clear majority of those who were present at the first meeting voted at the second meeting also.

Held, by the Court of Appeal reversing the majority of the Division Bench, that the Confirming Authority when considering the question are acting judicially and must exercise their functions judicially. Accordingly it was incumbent on the Authority to meet again and hear the counsel and the other

parties concerned in the matter. Also the Confirming Authority ought to be composed in the same way on both occasions.

PRINCESS PALEY OLGA *v.* WEISZ, (1929) 1 K.B. 718: 98 L.J.K.B. 465.

International Law—Soviet Republic—Recognition of—Seisure of goods and sale thereof—Sale if valid and passes a good title to the purchaser—Independence of foreign Governments.

Against the plaintiff's will, a section of revolutionaries in Russia, whose act was subsequently adopted by the Soviet Government, took possession of the contents of her palace at Paley. The Soviet Government was recognised by the Political Department of the British Government in 1924. The properties in question in the action were in England in the possession of the defendants who claimed it by a sale from the Soviet Government.

Held, following *Oetjen* v. *Central Leather Co.* [246 U.S. 297], that when a Government is recognised by the Political Department of our Government as the *de jure* Government of the country in which it is established, such recognition is binding on the Courts, and is retrospective in effect so as to validate all the actions of that Government. Every sovereign State is bound to respect the independence of every other foreign State and could not inquire into the validity of such State's acts.

BROWN *v.* DAGENHAM URBAN DISTRICT COUNCIL, (1929) 1 K.B. 737.

Local Government—Urban District Council—Dismissal of Assistant Overseer without notice—Power to remove him at will—Contract to give three months' notice—If entitles clerk to three months' pay.

A clerk and Assistant Overseer of Dagenham Council was absent on three weeks leave when, without hearing him, he was dismissed from office for alleged misconduct by a resolution of the Council. Under the contract of appointment he was to have three months' notice.

Held, the plaintiff was entitled to arrears up to the date of removal but not to further salary for three months—the period of notice. The statute by S. 189 (Public Health Act, 1875)

empowered the Council to dismiss at their pleasure and the Council cannot divest itself of that power by a contract incompatible with it. The Court will not substitute its view of the misconduct—if true or not.

HOBBS *v.* TINLING & CO. AND HOBBS *v.* NOTTINGHAM JOURNAL, (1929) 2 K.B. 1: 98 L.J.K.B. 421.

Defamation—Libel—Defendants paying a certain sum as damages for alleged libel—No plea of justification—Plea of mitigation of damages based on same facts—Defendant if entitled to cross-examine plaintiff as to his character—Jury intervening and intimating to the Judge that evidence was enough—Failure of Judge to mention it to counsel—Judge not summing up—Unsatisfactory trial.

After the conviction of the plaintiff for an attempt to blackmail an Indian Prince, Mr. *A,* defamatory articles appeared in the defendants' papers purporting to give the previous history of his life. The plaintiff also pleaded an innuendo which was practically a repetition of the alleged libel. The defendants without pleading justification paid into Court 20*s*. as sufficient damages for libel and denied the innuendo. The plaintiff sought to prove that but for the solitary instance in *A's* case, his character was clean. The defendants' counsel cross-examined the plaintiff by putting to him specific incidents which were not mentioned in the libel. The cross-examination was allowed in spite of objection. In the middle of the examination, the jury intervened and intimated to the Judge that they had heard sufficient evidence. The plaintiff's counsel thereupon addressed the jury and the jury found for the defendants without any summing up by the Judge.

Held, the trial was unsatisfactory. Though the cross-examination may be admissible in so far as it tended to shake the credit of the witness, matter of justification cannot be given in evidence in order to mitigate the damages.

Scott v. Sampson, (1882) 8 Q.B.D. 491: 51 L.J.Q.B. 380 followed.

The jury must have been told that their intervention before the plaintiff's case was closed was not proper and they should have been directed with regard to the effect of the cross-examination. The communication from the jury should have been mentioned to counsel also.

FLEETWOOD-HESKETH *v.* FLEETWOOD-HESKETH, (1929) 2 K.B. 55: 98 L.J.K.B. 353.

Construction—Separation deed between husband and wife—Covenant by husband to pay super-tax on wife's income except in respect of her separate income in excess of £1,400—Method of assessing husband's liability to super-tax.

By a separation deed, the husband covenanted to pay his wife £3,000 and to discharge all super-tax "payable in respect of the income of the wife not coming to her under or by virtue of this indenture not in excess of £1,400 for any year." The wife's separate income exceeded £1,400 in one year and the question arose as to the calculation of super-tax payable by the husband for his wife.

Held, that in order to ascertain the amount of super-tax payable by the husband in respect of the wife's income, the proper way is not to marshal the two parts of the wife's income so as to prefer one part to another but to apportion the super-tax payable on the total income of the wife between them in the ratio of £1,400 to the total income, excluding the £3,000 under the deed.

WATTS *v.* BATTERSEA BOROUGH COUNCIL, (1929) 2 K.B 63: 98 L.J.K.B. 273.

Local Government—Housing and Town Planning Act, 1919, *S.* 28—*"Receiver of rack rent"—Work done by Borough Council in repairing houses belonging to the estate—Solicitor of the administratrix collecting rents for her—Solicitor, if "owner."*

A solicitor acting for the administratrix of an estate and on her behalf received the rents of the houses belonging to the estate from the builder who collected it from the tenants. The solicitor never collected it himself direct from tenants. The houses fell into disrepair and as notices to repair were not complied with, the Borough Council repaired the houses and claimed the expenses from the solicitor as the person for the time being receiving the rack rent of the premises in question. The question was if a solicitor acting for the owner can also be an owner within the meaning of the Act.

Held, by Scrutton and Sankey, L.JJ., affirming the decision of the Division Bench, that the solicitor was "an owner" within the meaning of the Act which contemplates several owners and the liability attaches to any one who receives the rent as rent though as agent.

Greer, L.J., dissenting.—An intermediary between the actual receiver of rents (here builder) and the owner is not a receiver of rents as rents have already been paid and received by the builder. The definition in the Act says "owner" means *and not "includes"* the person receiving rents.

PERRIN *v.* DICKSON, (1929) 2 K.B. 85: 98 L.J.K.B. 447.

Income-tax—Policy of insurance for education—Payment in annual instalments by insurance company to the guardian of assured—Covenant to pay back premium without interest less annuities paid in the event of annuitant's death before period—Whether such annual payment is an "annuity" liable to income-tax.

By a policy of insurance, it was agreed that on condition of appellant paying a certain annual premium for six years, the company would pay his son, from after that period, a certain sum annually for seven years as for the boy's education; that further in the event of the son's dying before, the company would pay the appellant or his representative the paid-up premium without interest less any sums paid to the son up to then. The question was if these annual payments to the son were not "annuities" within the meaning of the Income-tax Act, 1918.

Held, by Rowlatt, J., that the amounts were not "annuities" but merely repayment of the capital with interest in one contingency and without interest in another contingency and as such only such amount as could be said to have been received for interest was assessable.

PATTERSON *v.* ROBINSON, (1929) 2 K.B. 91.

Shipping—Seamen—Neglect of duty—Charge of—No entry in the Official Logbook—Entry in book if a condition precedent to complaint—Merchant Shipping Act, 1894, *S.* 228.

To a complaint against the seamen by the master of a ship for unlawfully combining together to neglect duty, the entry in the logbook is not a condition precedent, though the Act enjoins in the interests of the seamen such an entry being made on pain of fine being imposed for failure to keep the log. The Act makes an entry in the logbook admissible in evidence but does not make it the only evidence.

Per *Avory, J.*—"If this were not the true view, it would, in my opinion, lead to the absurd result . . . . that if a seaman

or a number of seamen assaulted the master and the other officers and rendered them incapable of making an entry in the log-book, they would thereby save themselves from ever being proceeded against or punished for the offence. . . ."

LONDON COUNTY COUNCIL *v.* MAHER, (1929) 2 K.B. 97: 98 L.J.K.B. 492.

Education—Parent omitting to send his son to a certified school—Sending child to an uncertified school—Certified school being residential and twelve miles away—Education Act, 1921, *S.* 49, *if exhaustive of reasonable excuses for non-attendance.*

A mother of a deaf child aged fourteen took steps to provide efficient instruction to the child but the complaint was preferred against her that she did not send the child to a school certified as suitable for education. It was found that such a school was 12 miles from her residence and no proper conveyance was provided for the child.

Held, S. 49 is not exhaustive of the list of reasonable excuses for a parent. The section enumerates certain excuses which, if established, must be accepted willy-nilly by the tribunal and if other excuses are pleaded, option is given to the tribunal to accept it or not. The section says that the following *shall be* reasonable excuses and does not say "There shall be no reasonable excuse except them."

DUDLEY AND DISTRICT BENEFIT BUILDING SOCIETY *v.* GORDON, (1929) 2 K.B. 105: 98 L.J.K.B. 486.

Landlord and tenant—Mortgage—Mortgagor authorising tenant or mortgagee—Mortgagor undertaking to pay periodically towards capital—In default for three lunar months, the mortgagee entitled to enter into possession—Default—Notice by mortgagee to quit—If Small Tenements Recovery Act Justices have jurisdiction.

Under a mortgage executed by the respondent, he undertook to make monthly payments towards capital and empowered the mortgagee to enter into possession of the property if default was committed in payment of three instalments. The mortgagor also attorned tenant from year to year to the appellant society and it was further provided that when the society became entitled to enter into possession, the society may determine the tenancy on seven days' notice in writing in that behalf. The

mortgagees gave such a notice of seven days but the mortgagors refused to quit. On an application under the Small Tenements Recovery Act, 1838, for an ejectment warrant.

Held, that the Courts of Summary Jurisdiction have power to deal with some cases where questions of title are involved and the effect of the clause fixing seven days' notice was that such a notice was sufficient to determine the tenancy created by the deed, although it was a tenancy from year to year, as the Act contemplated a determination of tenancy by a "legal notice to quit or *otherwise*."

Friend v. *Shaw*, (1887) 20 Q.B.D. 374 and *Arden* v. *Boyce*, (1894) 1 Q.B. 796 distinguished.

GRIFFIN *v.* GREY COACHES, LTD., (1929) 98 L.J.K.B. 209.

Hackney Carriage—"Plying for hire," meaning of—No license to ply within a "prescribed distance"—Poster inviting passengers put up within the prescribed distance and tickets also issued there—Motor coach not waiting to pick up at the time of sale of tickets—Antecedent contract, meaning of—Town Police Clauses Act, 1847, *S.* 45.

By posters attached near a garage situated within the "prescribed distance" in Brighton county, the respondent company invited the public to travel by one of their coaches. The issue of the tickets for the journey is closed some time before the coach is brought there. The question arose if the respondents plied for hire when "there had been no waiting for passengers by the motor coach but an antecedent contract of carriage in each case."

Held, the poster constituted a general invitation by the persons in charge of the vehicle to the members of the public to make contract for carriage in the vehicle and a man might ply for hire with a carriage without exhibiting it.

Sales v. *Lake*, (1912) 1 K.B. 553: 91 L.J.K.B. 563 distinguished as an exceptional case on the facts.

JOTTINGS AND CUTTINGS.

Administrative Law.—Professor De Montmorency, in a letter to Thursday's *Times*, gives a new turn to the discussion on the extension of "Administrative Law". He calls in aid a parallel with the similar process which was going on in the

Roman Empire in the Third Century of our era. The transference of the judicial power to the Executive from the Judiciary was a phenomenon specially manifested then, as it is also a phenomenon specially manifested in the British Empire to-day. He forbears to point out that the Roman Empire was already on the verge of "Decline and Fall," and so press the parallel further, and we will exercise the like forbearance. And perhaps, even then, Rome had a couple of centuries to look forward to. But while in Rome and her provinces "the administrative system undermined the law, in our Empire it boldly sweeps it aside." Prof. De Montmorency has his remedy. He recognises that "the slow judicial method" cannot be preserved in its entirety, and the French system of Administrative Law, while excellent in France, is not in accordance with "British lines of judicial thought." Hence he recommends the creation of Courts, in the strict sense of the word, which can review administrative action, while legislation shall prescribe the procedure to be followed by the Departments in deciding cases withheld by statute from the purview of the ordinary Law Courts. The letter is useful and suggestive.—*L.J.*, 1929, p. 138.

Imprisonment for Debt in Turkey.—A new law dealing with debtors has come into force (writes *The Times* correspondent). Whereas before, persons who failed to pay their debts regularly were imprisoned, under the new law offences of this description may not be punished with imprisonment. All those serving sentences for debt have been released.

The effect of the new law will be felt chiefly in the lower classes, the members of which habitually borrowed money without security, and were induced only by fear of imprisonment to honour their debts.—*L.J.*, 1929, p. 162.

The Rejected Robes.—The late Earl of Rosebery showed characteristic thoughtfulness in bequeathing his robes as Chancellor of the University of London for the use of his successor. Most official robes are costly, and even in the highest of offices it used to be customary for an incoming dignitary to try and purchase the robes of the man he was succeeding.

It was so among Lord Chancellors, but when Lord Erskine ascended the Woolsack, in succession to a notorious evil-liver,

he chose to break with tradition. The retiring Lord Chancellor sent his valet to inquire if Erskine would purchase his ermine. "Tell him," replied Erskine, "that I do not propose to take up the abandoned habits of my predecessor."—*L.J.*, 1929, p. 162.

The Chief Justiceship and the Law.—The *Daily Telegraph* is publishing in a series of articles Lord Hewart's book on "Bureaucracy," which has for some months been known to be in preparation. It is not too much to say that the appearance of the book, under the title "The New Despotism," will be an event of constitutional importance. It is welcome, and it is fitting, that this exposure of the intrusion of Government Officials into the domain of the Judiciary should come from the Lord Chief Justice of England, a title which rivals and perhaps excels that of the Lord Chancellor. For the Lord Chancellor is very much besides a judge. The Lord Chief Justice is in his office a judge alone, and the guardian of the Common Law. The passage of 300 years has buried in oblivion—or in "fusion"—the stand which Coke made for the Common Law against Equity. That may have been a mistake, but it was otherwise with his attack on the prerogative of the Crown which cost him the Chief Justiceship and has passed into history. It was later, when he was only a Parliament man, that, as a preliminary to the drafting of the Petition of Right, he said: "The State is inclining to a consumption, yet not incurable; I fear not foreign enemies; God send us peace at home. For this disease I will propound remedies."—*L.J.*, 1929, p. 163.

"Administrative Law."—It is a different battle that now is joined, and a different disease that has to be diagnosed. Coke's "strong and manly eloquence," in Ben Jonson's epigram on him, may have involved danger of the Tower and worse. In fact, however, the Royal displeasure vented itself in a command to correct his Reports, which in Jame's opinion were bad in law and subversive in politics. Lord Hewart will not go to the Tower, and he has not been guilty of Reports. None the less there is a distinct struggle now going on between the regular law of the land—the Rule of Law—and what by contrast is known as administrative law. Administrative law in the view of Lord Hewart is no law at all. We will not discount the effect of his argument when it is complete, and one quotation shall suffice. After describing the secret decision

of disputes by Departmental officials, he says: "To apply the terms administrative 'law' and administrative 'justice' to such a system or negation of system is really grotesque." At present the system has legislative sanction in numerous Acts of Parliament, and when the House of Lords had to consider the statutes in *Local Government Board* v. *Arlidge* (1915, A.C. 120) it had to give it judicial sanction. But that is no reason why a system, started surreptitiously and gathering strength as it goes, should not be checked. The authority of Lord Hewart's book should be very efficient for this purpose, and we await the remedies that he will propound for "this disease".—*L.J.*, 1929, p. 164.

Judge Jeffreys' Chambers.—There has been of late a revival of interest in that enigmatic figure, Judge Jeffreys. Jeffreys and the Bloody Assize are two names inseparably linked in English history, and the most recent study on both may be found in Sir Edward Parry's latest book. But, as Lord Birkenhead has pointed out, there are aspects of Jeffreys' career which do not merit the same wholesale condemnation that attaches to his reputation in Crown prosecutions. In whatever light we view him, he was a forceful personality, and any link with him existing to-day is of interest. We would, therefore, draw our readers' attention to two articles (the second of which appears to-day) in which the whereabouts of Jeffreys' chambers in the Inner Temple receives fresh investigation. It has hitherto been supposed by historians of the Temple that these were in Hare Court, in a building destroyed by fire in the year 1677. But Mr. Melville Balfour, the writer of the article, believes this to be erroneous and that, in fact, they were in the still existing No. 4, King's Bench Walk. On the conclusiveness of the evidence which Mr. Balfour adduces we do not presume to comment, but if his case be made out, No. 4 will be invested with an interest not confined to the Inner Temple alone.—*L.J.*, 1929, p. 165.

The Rejected Robes.—A correspondent points out an error which by inadvertence was made in a paragraph in The Law Journal last week. This purported to deal with Lord Erskine's Chancellorship and turned a well-known witticism into a libel on the character of Lord Eldon. Fortunately a libel on the dead is not actionable. In fact, as our correspondent points out, the story related to Henry Erskine, the younger brother of Thomas,

the Lord Chancellor. There was an eldest brother, the Earl of Buchan—not especially distinguished—who, when he remarked to the Duchess of Gordon: "We inherit all our cleverness from our mother," received the stinging reply: "I fear that, as is usually the case with the mother's fortune, it has all been settled on the younger children." Henry Erskine in 1783 succeeded Henry Dundas, afterwards Lord Melville, as Lord Advocate; Dundas considered himself so indispensable that he said: "No man in Scotland will venture to take my place." But he reckoned without Henry Erskine, and it was on the occasion of that change in the office that Dundas, foreseeing only short use for the silk gown Erskine would have to buy, offered him his own. "It is hardly worth while" he said; "for the time you will want it you had better borrow mine." And then Erskine: "From the readiness with which you make the offer, Mr. Dundas, I have no doubt that the gown is a gown made to fit any party; but, however short my time of office may be, it shall never be said of Henry Erskine that he put on the abandoned habits of his predecessor." The story is only an illustration of ready wit, and there was no imputation on the private character of Lord Melville, though he was impeached 20 years later—and acquitted—for alleged improper conduct as Treasurer of the Navy.—*L.J.*, 1929, p. 165.

The Independence of the Bench.—One of Lord Hewart's articles on "The New Despotism," now being published in *The Daily Telegraph,* deals with the proposal for a Minister of Justice (25th instant), and treats that proposal as involving the independence of the Judges. Whether it would do so depends upon the nature of any scheme for the redistribution of the functions, as regards the administration of justice, of the Lord Chancellor and the Home Secretary, and it should be a part of such scheme to keep the appointment of Judges above suspicion. "A strong case is made out for the appointment of a Minister of Justice." So it was said in the Report of the Machinery of Government Committee in the tenth and final Part dealing with Justice, a part which Lord Haldane, the Chairman of the Committee, wrote with his own hand: *see* his Autobiography, p. 253. But his object was to prevent the overlapping of the functions of the Lord Chancellor's Office and the Home Office, and although he proposed to divest the Lord Chancellor of judicial duties—he himself did not undertake such duties in his last Chancellorship—we doubt whether he would have been a party to any scheme which threatened the independence of the Judicial

Bench. He was keen on the appointments of Judges being made only on high legal and professional qualifications, and the present practice in this respect is perhaps due to the efforts of Lord Oxford, when he was Mr. Asquith, and himself.—*L.J.*, 1929, p. 178.

A Minister of Justice.—But Lord Haldane has gone, and though Lord Passfield, as Mr. Sidney Webb, was another member of the Machinery of Government Committee, there appears to be no scheme now on foot for carrying out its recommendations Any necessity for it has, indeed, been averted by the recent development of the permanent secretariat to the Lord Chancellor. This, according to Lord Birkenhead, the protagonist hitherto against the suggested Ministry (see *Points of View*, Vol. I, Chap. 4), is the offspring of Lord Selborne and Lord Muir Mackenzie, and their work has been admirably carried on by Sir Claud Schuster. Lord Birkenhead's criticism takes the same line as Lord Hewart's; the appointment of the Judges, he thinks, would be transferred to the Minister of Justice, and he demonstrates—with what correctness we need not say—that the Minister would of necessity be a lawyer who was himself not in the running for judicial appointment, and therefore not of the first rank. At present the Lord Chancellor, while he appoints all the High Court and County Court Judges, does not make the highest appointments. The Lord Chief Justice, the Lords of Appeal, the Master of the Rolls, the President, and the Lords Justices are all appointed by the Prime Minister, but we should imagine he takes counsel with the Lord Chancellor. One observation which Lord Birkenhead makes may be quoted: "The position of the Lord Chief Justice and of the Master of the Rolls must, like that of the Attorney-General, be enhanced by the disappearance of the Lord Chancellor." So Lord Hewart's criticism may be regarded as altruistic.—*L.J.*, 1929, p. 178.

Dangers of the Streets.—The second report of the London and Home Counties Traffic Advisory Committee on street accidents in Greater London brings home to the reader with great vividness the risks which the pedestrian has to face in the more frequented streets of London. Comparing accidents with the estimated population of Greater London—a figure which is useful only to enable one to establish a standard of comparison—it appears that in 1921 one person out of every 12,970 was killed, and one out of every 322 injured, whilst in 1927 one person

out of every 7,292 was killed and one out of every 159 was injured. In very congested areas where the traffic necessarily moves relatively slowly and is strictly controlled, the chief cause of accidents to pedestrians appears to be "crossing without due care"; and out of 1,554 fatalities for the two years 1927-1928, no less than 678 are officially attributed to this. So far as children are concerned, the separate report on street accidents to children states that running across the street without due care was the cause of more than one-third of the fatal accidents to children. The problem of how the appalling mortality caused by street accidents in cities is to be prevented is a very difficult one; but it is essentially different from the question of the prevention of accidents on country highways, where the majority of accidents involve collisions between two or more vehicles. The pedestrian in the towns is slow to realise that there is a responsibility on him to make sure that he can safely cross a crowded street; we are all, for instance, too apt to try to dodge between vehicles moving at different speeds. Sub-ways under dangerous crossings are one way of dealing with the problem; but it is notorious that the pedestrian is very slow to take advantage of such of these as exist. Plainly marked crossing places are also useful. So far as the problem of safety on the roads relates to cities and towns the main solution appears to lie in the education of the pedestrian; so far as it relates to country roads and to villages, it depends upon the education and control of the motorist.—*L.J.*, 1929, p. 178.

The Freedom of the Seas.—Legally the Joint Statement of the result of their conversations which has been issued by President Hoover and the British Prime Minister has no immediate effect, but it may be expected to have important results in the settling of long-standing differences as to the Laws of Maritime Warfare. It is presumably to this and related questions that reference is made in the mention of "important technical matters requiring detailed study," and they are to be the subject of active consideration Popularly the topic of these questions is known as "The Freedom of the Seas." It involves the right of capture of private property, and the right of neutral States to trade with belligerents. But British doctrines have been the result of special conditions, and other countries, as they become subject to similar conditions, tend to approximate to the same views. Possibly in a Code of International Law, a common basis can be arrived at. Henceforth, however, accord-

ing to the Joint Statement, the Kellogg Pact is to be accepted, not only as a declaration of good intentions, "but as a positive obligation to direct our national policy in accordance with its pledge." The implication of this is that the question of the "Freedom of the Seas" will cease to be a matter of contention. Possibly this is too optimistic.—*L.J.*, 1929, p. 213.

The State of the Lists.—The new legal year commences to-day, and the Courts will resume on Monday with a total of 83 appeals and 2,111 causes for hearing. There is a substantial reduction in the number of appeals as compared with last year, and the figure, 83, is, indeed, we believe, the lowest for the commencement of any Michaelmas Sittings during the present century. This year's total of 83 is made up of 16 Chancery Appeals, 35 King's Bench appeals, 8 Workmen's Compensation cases and 24 others, including 11 interlocutory appeals; and it compares with 112 a year ago, 479 in 1901, 363 in 1913, and 211 in 1921. Small appeal lists are very satisfactory from every point of view except, perhaps, that of the counsel and solicitors engaged in them; they indicate very reliably the quality of the justice dispensed by the Courts of first instance, although the question of expense no doubt deters some litigants from carrying an adverse decision to appeal. One natural result of the smaller appeal lists is that cases which are the subject of appeal are now finally decided in a very much shorter time than was formerly the case; it is now no uncommon thing for an appeal to be heard in the same term as that in which the case was originally tried; and the days, not so many years ago, when there was little or no prospect of an appeal coming on within a year of its being set down, seem to be, and we hope are, gone for ever.—*L.J.*, 1929, p. 213.

Taking the Oath.—Mr. Sylvain Mayer, K.C., in a letter to *The Times* of October 11, compares the method in which the oath is administered to witnesses in Germany with that in our English Courts, very much to the advantage of the former. In Germany, the presiding Judge administers the oath, and he, and all present in Court, stand whilst the witness is being sworn. In this country, says Mr. Mayer, the oath is administered in a very perfunctory manner.

As a rule the Clerk of Assize or the Associate does it, but if these gentlemen are not in Court it is administered by the Judge's clerk.

Very little notice is taken of it, and very often conversation is carried on in the body of the Court whilst the witness is being sworn

There is only too much truth in this criticism; and we entirely agree with Mr. Mayer that if more solemnity were introduced into the administration of the oath, there might well be less perjury than at present. The Divorce Courts, where perjury is admittedly very prevalent, set a particularly bad example. The words of the oath are printed on a card which lies on the ledge of the witness-box; and the oath is administered by the usher, who hands the witness the Testament, and directs him to read from the card. During this process there is usually a buzz of conversation in Court. But it is not, we think, necessary to adopt the German procedure to ensure the proper and solemn administration of the oath; it would be quite sufficient if the practice of the Chancery Division in this respect were universally followed. In that Division the oath is administered by the Registrar, who rises for the purpose. The usher hands the Book to the witness and directs him to hold it up—and he then calls for silence. The Registrar waits until the Court is still, and then administers the oath slowly and plainly. If any person speaks, or even if counsel restles a paper, he stops and begins again; and if there is any difficulty in obtaining complete silence, the Judge personally intervenes and directs that silence be kept whilst the witness is sworn. A direction by the Presidents of the other Divisions that the Chancery procedure in this respect should be followed is all that is necessary to effect a most desirable improvement.—*L.J.*, 1929, p. 234.

Selling a Wife.—We get from time to time stories in the Press of wife-selling, but they always seem a little apocryphal. However, in an article, "Wife-Selling in England," in the current *Law Quarterly Review,* Prof. Courtney Kenny shows that there is a good deal of truth in them. Sheffield and Manchester, and Smithfield Market in London, and another Smithfield in Birmingham, had, according to him, a bad pre-eminence in this respect, and he points out that, unless the practice had penetrated into Wessex, Hardy would have scarcely made it the starting point of *The Mayor of Casterbridge*. The last instance Prof. Courtney Kenny has noticed was at Sheffield in 1887. Of course, it is easy to show that the transactions were illegal, and he refers to *Rex* v. *Mears* (4 Cox C.C. 423, 427) and *Rex* v. *Howell* (4 F. & F. 160). Both these, the first in 1851 and the second in 1864, were cases of conspiracy to procure illicit intercourse, and

though wife-selling was not in question, the analogy is obvious. But while essentially unlawful, there was a certain assumption of regularity. When the sale took place in a public market, the accustomed market toll was levied and paid, and the subject of the sale had to be led to market by a rope—sometimes a ribbon—and handed over and led away in the same fashion. And Prof. Courtney Kenny has even found in the British Museum a bill of sale of a wife made at Midsomer Norton, Somerset, and dated October 24, 1766, which from is technical form seems, he says, to have been copied from a precedent book. It is under hand and witnessed, and the grantor, for the sum of six guineas, "doth sell, assign, and set over" his wife to the purchaser, "with all right, property, claim, services, and demands whatsoever" that the grantor has in her for the term of her natural life It would be interesting to discover the genesis of this instrument, but we fear a search of the Precedent Books of the eighteenth century would be hopeless. Perhaps it was due to the imitative ingenuity of a Somerset attorney's clerk.—*L.J.*, 1929, p. 235.

Lord Mersey.—It is with real regret that senior members of the Profession in particular will learn of the sudden death of Lord Mersey. A sound lawyer with a knowledge of the world, a strong and fearless personality, and a keen sense of public duty, he was markedly successful as a Judge of commercial cases, and as such rendered most valuable service in the King's Bench Division, and in his later days in the two final Courts of Appeal. Promoted at the age of seventy to be President of the Probate, Divorce, and Admiralty Division, he held office there for thirteen months only, but it was characteristic of his public spirit that, on the passing of the Administration of Justice Act, 1920, he should have been ready, at the advanced age of eighty-one, to return and lend his aid in clearing off the mass of arrears which had accumulated in the department of Divorce. It is interesting to recall that, amongst the many commissions over which Lord Mersey ably presided were those which inquired into three singularly tragic losses at sea, those of the *Titanic*, the *Empress of Ireland*, and, lastly, the *Lusitania*.—*L.T.*, 1929, p. 173.

Waiver of Diplomatic Privilege.—May diplomatic privilege be waived by the person entitled to claim the same? The answer is in the affirmative according to the ruling of the Lord

Chief Justice in *Dickinson* v. *Del Solar* (*Mobile and General Insurance Company, Ltd., Third parties*), reported in *The Times*, 1st August. In that case the defendant, acting on the instructions of his superior, who was the Peruvian Minister in this country, waived the diplomatic privilege to which he was entitled, and submitted to our jurisdiction by entering an appearance to an action in which damages were awarded against him for negligently injuring the plaintiff.' The third parties with whom the defendant was insured had taken up the line that the assured had acted to the detriment of the company's interests within the terms of the policy by failing to exercise the privilege which would have rendered him immune from proceedings. It was held, however, that the judgment against the defendant created a legal liability against which the insurance company had agreed to indemnify him. On the point of waiver it is surprising that there should have been any argument in view of the authorities. In *Suarez* v. *Suarez*, (1918) 1 Ch. 176, a minister of a foreign state in England was sued for an account as administrator to an intestate's estate; he waived his diplomatic privilege and instructed his solicitors to accept service of an originating summons in the proceedings. It was held by the Court of Appeal, following *Taylor* v. *Best*, (1854) 14 C.B. 487, that an ambassador or public minister can, with the consent of his government, effectually waive his privilege and lose the immunity conferred thereby. The same rule was laid down by the House of Lords in *Duff Development Co., Ltd.* v. *Kelantan Government*, (1924) A.C. 797. There still remains a doubt, however, as to whether execution can issue on a judgment obtained against a person who has waived his diplomatic privilege. This question was discussed, but did not arise for decision in the last-mentioned case, *vide* Lord Sumner, at p. 830 of his judgment.—*S.J.*, 1929, p. 533.

The New Judge.—The vacancy created in the Chancery Division by the retirement of Mr. Justice Astbury has been filled by the appointment of Mr. C. J. W. Farwell, one of His Majesty's counsel practising in that division. Sir John Astbury, though perhaps not the most outstanding of our Chancery Judges, was a sound lawyer and a very practical man with possibly a little too much leaning towards inducing parties to settle Prior to his elevation to the bench Sir John was one of the busiest men of his day, being the outstanding leader of the "patent" Bar. His health has not, during the past few years, been any too good—in fact not very long ago he was

said to be in considerable danger of losing his eyesight; from this tragedy happily he was preserved, and we all hope that in his retirement he will enjoy many years of improved health after a strenuous career at the Bar and valuable service upon the Bench. His successor, Mr. Justice Farwell, must, indeed, have the Chancery tradition bred in his bones, for he is the son of the late Lord Justice Farwell, and a grandson of the late Vice-Chancellor Wickens. He was called to the Bar at Lincoln's Inn in 1902, of which Inn he is now a bencher, and after a very successful career as a junior took silk early in 1923. As a leader he enjoyed the reputation of being one of the best lawyers in Lincoln's Inn, and his practice, though by no means inconsiderable, was not so great as his ability deserved. For some years he was attached to Mr. Justice Romer's Court, and it is said that he was one of those silks who benefited considerably when the Chancery Courts were thrown open. His appointment was no doubt somewhat of a surprise to the prophets in these matters, but there is no doubt that Mr. Justice Farwell will carry with distinction the ancestral mantle which has fallen upon him.—*S.J.*, 1929, p. 667.

CONTEMPORARY LEGAL LITERATURE.

The following extracts from a short article entitled "Wife-selling in England" by Mr. Courtney Kenny in the *Law Quarterly Review* (for October, 1929) will afford interesting reading:—

An aristocratic instance, as old as the reign of Edward I, of the transfer of a wife is cited by Dugdale (Baronage, I, 767). The wife of Sir John de Camoys had eloped with Sir William Paynel; and to the adulterer Sir John 'spontanea voluntate mea' made, by grant under seal, a gift of the lady, together with her goods and chattels. After the husband's death, Sir William married her; and he and she then, in 28 Ed. I, claimed dower for her out of Sir John's lands. But in 30 Ed. I, judgment was given against them, on account of her adultery; and the deed of grant, on which they had relied, was of course treated as no excuse.

The great majority of those who took part in wife-selling seem to have had no doubt that what they did was lawful, and

even conferred legal rights and exemptions. They were far from realizing that their transaction was an utter nullity; still less that it was an actual crime and made them indictable for a conspiracy to bring about an adultery.

Lord Mansfield could recall (3 Burrows 1438) 'a cause in the Court of Chancery wherein it appeared that a man had formerly' (?formally) 'assigned his wife over to another man. And Lord Hardwicke directed a prosecution for that transaction, as being notoriously and grossly against public decency and good manners.'

From the beginning of the last quarter of the eighteenth century until nearly the end of the nineteenth one, journalists frequently recorded instances of wife-selling. The last that I have noticed was in 1887 at Sheffield. That town and also Manchester and the metropolitan market of Smithfield and a market of the same name at Birmingham appear to have been conspicuous for the practice. Had it not penetrated into Wessex too, Hardy would scarcely have ventured to make it the starting point of his 'Mayor of Casterbridge.'

In no instance of which I have read does the wife appear to have exhibited any reluctance to be alienated. Nor is this surprising; for she might well think that by any average Englishman she would likely to be better treated than by a husband who had so conspicuously shown his disregard for her.

The prices paid differed very markedly; ranging from a pint of beer to a handful of guineas. For there would be corresponding differences in the attractiveness of the ladies themselves; and also in the zeal of their purchasers, for the buyer might be merely a casual stranger or, on the other hand, an attached paramour.

Customary solemnity required that the husband should lead the wife into the market by a halter—usually of rope but sometimes of ribbon—and that the purchaser should take his halter and lead her away by it.—Cf. *The Times* of March 30, 1796, and July 18, 1797.

But the strongest proof of the high current estimate of the efficacy of these transactions is the trouble sometimes taken to create formal evidence of them A striking instance of this is preserved in the British Museum (Additional Mss. 32,084). It is a bill of sale of a wife, couched in such full technical form

as to suggest that it may have followed some accustomed precedent.

The assignment runs thus:—

'Memorandum.

'Oct. 24, 1766.

'It is this day agreed on between John Parsons, of the Parish of Midsummer Norton, in the county of Somerset, clothworker, and John Tooker, of the same place, gentleman, that the said John Parsons, for and in consideration of the sum of six pounds and six shillings in hand paid to the said John Parsons, doth sell, assign, and set over unto the said John Tooker, Ann Parsons, wife of the said John Parsons; with all right, property, claim, services, and demands whatsoever, that he, the said John Parsons, shall have in or to the said Ann Parsons, for and during the term of the natural life of her, the said Ann Parsons. In witness whereof I, the said John Parsons, have set my hand the day and year first above written.

'JOHN PARSONS.

'Witness: WILLIAM CHIVERS.'

Mr. Arthur E. Langman of Toronto has in an article on 'Municipal Taxation of Incorporeal Rights' contributed by him to the *Canadian Bar Review* (June 1929) suggested legislative reform in the law of Ontario regarding taxation with respect to easements and incorporeal rights in land. As the writer points out referring to 1895 A.C. 133, 9 B. & C. 95, 9 B. & C 820, 9 B. & C. 114, and 1893 A.C. 416, in England it has been held that Easements as such are not rateable or taxable. As incorporeal rights can have no independent existence, the suggestion by the author is that they should be taxed as a part of dominant tenement to which they are appurtenant. There is very great force in the argument advanced that when once an incorporeal right is granted over property *A* in favour of property *B*, the value of *A* is to that extent diminished and that of *B* enhanced. One practical difficulty is also suggested in favour of this plea If a servient owner creates a number of incorporeal rights and then finding his property not worth the heavy tax allows the property to be sold for non-payment of taxes, then it raises the question whether the sale will extinguish the third party's incorporeal rights, when for aught

one knows, the third party might not even have known of the default.

Professor William S. Holdsworth, a member of the Sir Harcourt Butler Committee appointed to enquire into the problem of the Indian States has contributed a short article to the New York University *Law Quarterly Review* for September, 1929, wherein he deals with the anomalous position occupied by the Indian States and some of the reasons which led the Committee to report as they did. The two Indias, as the professor calls them, *viz.*, British India and the Indian States, differ markedly in their administration and relationship to the Crown. The King-Emperor reigns supreme over both, but with this important difference that whereas he rules British India through a machinery set up by him ranging from the Secretary of State for India down to the Governors of the provinces and civil servants, he governs the States only indirectly and to a limited extent. The Indian States occupy a little more than a third of the entire India with a population of roughly a fifth of the whole of India. There are about 562 States, some of considerable area, while many are small, some even less than a square mile. In the larger States, the rulers have legislative, executive and judicial powers over their subjects and are given a seat in the Chamber of Princes in their own right, while the smaller ones have only a right to elect a representative to sit in the Chamber. The writer traces the origin of the bifurcation into British India and states to the policy of the East India Company which, consistently with its purpose, namely of securing facilities for expanding their trade, concerned itself only with the rich and accessible sea coast and the great river estuaries and left the interiors ruled by warlike tribes alone. The writer discusses the nature and relationship between the Princes and the Crown during four stages.

(*i*) *Down to the year* 1813.—The East India Company was then bent on safeguarding the dominions it had won from competing powers and desired no further expansion. That explains its then policy of non-intervention and the several treaties it concluded with the princes.

(*ii*) *From* 1813 *to the Mutiny of* 1857.—The East India Company concluded further treaties which recognised the paramountcy of the Crown, while the States were left sovereign and independent internally, except when disloyalty or disorder

within the States called for an armed intervention from and annexation by the Company. The expressions 'mutual alliance' and 'reciprocal agreement' in the prior treaties were changed to 'subordinate alliance,' 'protection' and ' subordinate co-operation' in the treaties of this period.

(*iii*) 1857-1909.—The policy of annexation was dropped and a new policy of co-operation and partnership was substituted. The Crown brought into existence a Political Department to rule in place of the Company. But this change tended to aggrandize the paramount power and minimise the rights of the States. In fact, the Viceroyalty of Lord Curzon made the princes very apprehensive of internal intervention and it was not till Lord Minto in his famous Udaipur speech in 1909 guaranteed internal independence and external protection that their fears were allayed.

(*iv*) *From* 1909 *to the present day.*—The Imperial Government assumed a certain decree of responsibility for the general soundness of the State's administration to avoid its being said that they indirectly allowed misrule to prevail. This was emphasised by Lord Hardinge at Jodhpur when he called them as "helpers and colleagues in the great task of Imperial rule". We now find in many of the principal States 'a responsiveness to modern political ideas,' legislative councils, High Courts, separation of judiciary and executive and other modern ideas have been introduced in several of them and the efficiency of the government thereby increased. The Courts in the States are also governed by practically the same law as in British India. This development of the States has now elevated their relationship to the paramount power from that of 'dependent and superior' to 'junior and senior partners'.

The professor states that as the relationship between the Indian Princes and the Crown has a 'concensual' basis—(*i*) treaties, sanads and engagements, (*ii*) custom and political practice consented to by the States, the Crown cannot cede its rights and duties to any other State, including in the word "State" British India. According to the professor, it is this principle that was applied by Montague-Chelmsford Report when they recommended that the affairs of all the States should be placed under the control of the Government of India. The present Report of the Butler Committee has gone a step further and recommended that the relations between the Paramount Power and the States shall be handed over to the Viceroy

taking it out of the Governor-General-in-Council. The argument advanced is that the growth of responsibility will unfit the Ministers in British India responsible primarily to the Legislature from acting as the agents of the Government of India.

On the economic question—namely, such matters as maritime customs, railways, mints, coinage, salt, post office, opium, excise—the Committee felt that it would be premature to accept the suggestion of a federal constitution for India under the Crown, the States aid Provinces of British India being the constituent units and they accordingly recommended the continuance of the existing system with certain modifications. In the event of differences between themselves and the Government of India or between one or more States, the Paramount Power's right to decide by a fiat without a judicial enquiry is not taken away. But in questions of a legal nature, enquiry by Committees set up by the Viceroy to report to him has been recommended where the States and British India are to be represented. The professor concludes with a strong plea that whatever may happen to British India, the Princes and the Indian States are not to be handed over to the British India as they are entitled to demand that the Paramount Power should remain in India to fulfil its obligations under the treaties, etc., towards the Princes, who observed their part of the treaty by helping the British rule during the dark days of the Mutiny and the Great War.

BOOK REVIEWS.

THE CODE OF CRIMINAL PROCEDURE, by S. Roy. Published by Messrs. Butterworth & Co., Ltd. (India). Price Rs. 16.

In this book, the learned author has taken considerable pains to collect the entire case-law under each section. We find however with regard to some of the section, the author has not attempted to consider the effect of the recent amendments on the cases he has given in his notes. For example, in dealing with the power of Court to pass separate sentences, the effect of the deletion of the word 'distinct' before 'offence' in section 35 is not discussed; nor is the amendment of section 397 considered on the question of legality of concurrent sentences

where the accused is convicted at different trials. Again under section 88, the author has cited the cases which held that the Court was not bound to consider claims of third parties, without comment or explanation, although sub-section (6) (*a*) of the present section expressly provides for enquiry. With regard to the text of the sections, some of the amendments introduced after 1923 appear to have been omitted. The get-up and printing seem to be good. We wish the author every success in this, his first attempt at a commentary on the Criminal Procedure Code.

THE CODE OF CRIMINAL PROCEDURE, by K. N. Katju, M.A., LL.D. & S. C. DAS, M.A., LL.D. Published by the Allahabad Law Journal Press. Price Rs. 5-8-0.

We welcome the publication of this book by Messrs. K. N. Katju and S. C Das. The need for an accurate text of the Code of Criminal Procedure was keenly felt by the legal public, especially as the commentaries on the Code that have been published recently are far from satisfactory in this respect. We have no doubt that the learned authors have succeeded in their first and foremost object of providing an "absolutely reliable and correct text of the Act as amended up to the date of publication." Notes of case-law are given under the different sections and it is gratifying to note that no case of importance, old or new, has been omitted. The get-up is excellent.

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LAW REPORTS.*

The beginning of modern law so far as Madras is concerned dates from the Madras High Court Reports. One rarely goes beyond those reports though as I said in my last lecture there are both Supreme Court Reports and Sudder Dewany Adawlut Reports for Madras as for Bengal. The Sudder Dewany Reports are all after the same pattern. But the Supreme Court Reports from Calcutta are much fuller than those of Madras. For Madras we have only Strange's Notes of Cases, which are very scrappy somewhat in the style of ancient reports in England. Sir Thomas Strange is the best known of the Supreme Court Judges of Madras. He is known as the author of a highly-valued work on Hindu Law. There is another junior Strange who is also the author of a Manual of Hindu and Malabar Law. He was a Judge of the High Court and he is well known as the Commissioner deputed to inquire into the conditions of Malabar. The Madras High Court Reports contain some of the best written judgments of the Madras High Court. Some of the Judges are very distinguished men, Sir Colley Scotland, Sir Adam Bittleston, Mr. Holloway and Mr. Justice Innes. It used to be said when Sir Colley Scotland was appointed as the Chief Justice of Madras that Lord Westbury wanted to appoint a Scotchman but as no Scotchman was available he appointed Colley Scotland as Chief Justice of Madras but it was recognised on all hands that the appointment was a good one. He was apparently a Chief Justice with a personality and many well-written judgments stand to his credit. Mr. Justice Holloway

*The eighteenth of a series of lectures arranged by the University of Madras delivered by Mr. B. Sitarama Rao, Advocate, Madras High Court.

apparently believed in strong language but unlike the great run of judges who use strong language he had marvellous erudition. He was a Civilian and had large experience of Malabar. He had considerable acquaintance with the German jurists who make prominent appearance in his judgments. He is, in fact, a translator of one of the works of Savigny. So far as Malabar and Hindu Law are concerned, his lead was not always in the right direction. He was largely conservative and for consistency's sake, he put down the fairly well-established practice of partition both under the Marumakkathayam and Aliyasantana Laws and he is responsible for the simile of the full leech and empty leech, the strict rule as to maintenance of junior members and the doctrine of lapse to the family to which much of the discontent of Malabar with its system of law is traceable. He applied the doctrine of lapse also to the Hindu Law but the Privy Council knocked it on the head in the well-known *Sivaganga case*.[1] He was, as all his contemporaries were, under the influence of Colebrooke and other Bengal writers and he does not seem to have to the end fully realised the characteristic features of the Mitakshara though he never failed to point to the Mitakshara as being the highest authority for the South. So far as the general law is concerned, his attitude was correct and his judgments are sound and have largely stood the test of time. In *Narayanan Chetty* v. *Mrs. Jensen*,[2] he, sitting with Innes, J., said: "Undoubtedly, it is most desirable that, for the purpose of discovering the rule of equity and good conscience, the tribunals should always be encouraged to enquire how systems of positive law have in analogous cases understood and applied the rule. Safely to apply this process, however, a Court must have a very thorough knowledge of the system from which the principle is to be eliminated, and must take pains to reject principles of accidental and mere arbitrary growth, and distinguish them from such as really flow from the nature of the subject-matter." The qualification laid down properly applied, no doubt, to the two Judges who decided the case and the pupil of one of them, Mr. Justice Muthuswami Aiyar, who came after this series In *The Madras Railway Co.* v. *Zamindar of Karvetinaggur*[3] again he said: "A rule of English Law is not a rule for us, unless it is a correct rule, and it is quite possible that a rule excellent there may be wholly inapplicable here."

1. (1863) 9 M.I A. 544. 2 (1865) 2 M H.C.R. 383 at 384.
3. (1871) 6 M.H.C.R 180 at 183.

Acting on this principle, he refused to apply the rule in *Fletcher* v. *Rylands*[4] as unsuitable to Indian conditions. The Privy Council accepted more or less his view on the matter. His training in Roman Law and his knowledge of Comparative Jurisprudence gave him the courage to differ from the Lord Chancellor in that case. This is what he said: "The rule upon which the relative rights of men are to be determined is no mere unbending formula. . . . The true reason of the rule is that although not an immediate, national economy, wealth and prosperity, with all other objects of man's ethical interests, are mediate sources of law. This has had, always will have, and always ought to have, an important influence upon the construction of legal propositions. In the present case I say—Agriculture is the oldest of arts. It is still the one of the greatest primary importance. Human life cannot subsist without it, and, despite the Lord Chancellor, human life is more important than property." His interjection in a case "he knoweth not the law who knoweth not the reason of the law" shows his attitude on the question of the application of the English Law. His disquisition on cause of action and *res judicata* is still illuminating reading and is frequently quoted, and he had the boldness to differ as to what constituted a judgment *in rem* from such great authority as Smith, the author of Leading Cases and his view has been accepted. Like his contemporaries in England, he was for freedom of contract and deprecated Story's view as to the power of Court to interfere with the provisions of contract between parties on the ground of their being penalties. Though his views on certain matters like the powers of impartible owners to alienate were not accepted, he was one of those who gave right direction on most points of general law in this Presidency.

To Scotland and Innes belongs the credit of clearly defining the interest of the ryotwari proprietor not to be evicted except in the ways known to the statute, relinquishment or sale. To Innes also belongs the credit of putting the right of the ryotwari proprietor to water on the right basis as a *jus in re* and not merely as a contractual right.

The times of these reports have been often referred to as the age of great Judges and great Advocates. Mr. Mayne, Mr. Norton and Mr Sullivan crossed swords with Judges like Holloway and Scotland. There is no

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4 (1866) L.R. 3 H.L. 330,

doubt a certain element of *laudator temporis acti* in this sort of picture and in some respects, for instance, in manners the Bench seems to have in recent years improved very much with occasional lapses which more often than not prove the rule, but all told, judging from the reports, they seem to mark some of the best part of the life of the High Court. The Madras High Court Reports are fairly well-edited series. The facts are given fully and so also the judgment of the Lower Court whenever necessary. The arguments are occasionally though not always given. In addition to the High Court reports, we had a short-lived series known as the Madras Jurist. There was another series known as the Indian Jurist which came up to more modern times. It was of the type of the Indian Cases.

For Bombay, the modern law commences with the Bombay High Cuorts. The period opens with Sausse, C.J., and as puisnes among others Sir Joseph Arnould, a distinguished Judge, the biographer of Lord Denman. Sausse was succeeded by Couch and Westropp successively. Both of them were originally puisnes and subsequently became Chief Justices. The judgments of Westropp, the Privy Council has recently said, require respectful consideration; in fact, he is one of the strong Judges of the Bombay High Court. He has been party with West, J., to some of the most elaborate judgments on Hindu Law. Widow's right of maintenance, stridhana in Mitakshara, congenital blindness and status of illegitimate son among others have been dealt with most elaborately. On some points he may have been overruled, but his judgments were never slipshod or ill-considered. In this, the Bombay Judgments in the early reports, the same cannot be said of recent reports, contrast favourably with the judgments of the other Courts. Partly this may be due to the fact that the continuation of Peishwa sovereignty till 1830 made it possible to have learned Dharma Sastra Pundits in that part of India which was not possible elsewhere where learning of that sort had long gone under, and the passion for completeness of the Judges may also partly account for it. West, J., is the other Judge whose name is a byeword for judicial learning and elaborateness of treatment. Though on some occasions, the elaborateness errs by excess, there is no question that every subject receives at his hands the fullest and most illuminating treatment. His Sanskrit learning placed him in a specially advantageous position. One of his most elaborate judgments is about the incidents of the Muliwarg tenure where he and Sir Michael Westropp laid down that the Government

could enhance the assessment in the case of that tenure and, in doing so, has traversed over such a wide ground that in fact the judgment along with the judgment of Sir Michael Westropp may well be considered a treatise on the subject of ryotwari tenure and it has settled the law. In a later case he and Sir Charles Sargent, J., considered the Kumri tenure and that case is the leading case on the rights of the Crown over waste land. Mr. Justice Janardhan is the first Indian Judge, but so far as I have been able to see, he appears for a moment on the judicial stage in *Ramji* v. *Chinto*[5] and then disappears. Mr. Justice Nanabhai Haridas is the first real Indian Judge in the Bombay High Court. His judgments begin to appear from 10 Bombay High Court Reports. He has been a party to several well-considered judgments. He has the reputation of a learned Hindu lawyer and a sound Judge generally. His judgment on the limits of coparcenary and that on the rights of survivorship of illegitimate sons are well known. Sir Charles Sargent is the next Chief Justice who was a puisne before he became Chief Justice. He is also regarded as a strong Judge of the Bombay High Court

The early reports for the High Court of North-West Provinces are the Agra Reports and Full Bench Decisions and the North-West Provinces Reports. The North-West Province had no Supreme Court and we have had occasion to refer to the Sudder Adawlut Reports of that province already. There is nothing special to be said about the Sudder Adawlut reports of that province. They were all published on a uniform plan and were equally as elaborate or rather the reverse of it as elsewhere. An ambitious student of law who wants to trace the history of the land tenures, or any other branch of law of that province might look up these reports, but others rarely make any reference to these old series but that is not the case with the Agra and the North-West Province High Court Reports. The Agra Full Bench rulings cover the period 1866-1867. The Agra High Court Reports (1866-1868) and the North-West Provinces from 1869-1875. They contain many useful judgments but it must be confessed that the judgments of that High Court remain somewhat scrappy and lack the elaborateness of the judgments of the Calcutta, Bombay and Madras High Courts. The only Judges of consequence among them seem to be Sir Walter Morgan, C.J., and Turner, J, who both of them became later Chief Justices of Madras. The Bengal Law Reports, the

5 (1864) 1 Bom H.C.R. 199.

Madras High Court Reports and the Bombay High Court Reports contain some of the most learned judgments of those respective High Courts, whereas the same cannot be said of the North-West Provinces High Court Reports. The reputation of Allahabad was always low except when Mahmud, J., for instance, in later days, gave it distinction by his dissenting judgments. It is more the dissenting judgments of that Court that have become famous and in fact in good many instances settled the law at any rate for other provinces and finally for the Allahabad High Court itself.

High as the value of these various High Court Reports, of the highest value are the judgments of the Privy Council from the year 1836 reported in Moore's Indian Appeals which bring us right up to the Ind'an Appeals. These reports are the most valuable of all the reports dealing with India. There, you will see the foundation laid for the whole fabric of Indian Law. As early as 1 M.I.A. in the *Mayor of Lyons case,*[6] their Lordships lay down the limitations subject to which the English Law can be taken to be imported even into the Presidency towns. Their Lordships lay down the rules of exposition of Hindu Law in the *Ramnad case.*[7] They settle the rule of succession for self-acquisition of the member of a joint family in the *Sivaganga case,*[1] the rule as to converts in *Abraham's case,*[8] the requisites of a valid custom in the Ramnad and other cases and the powers of managers in *Hunoomanpersaud Panday's case.*[9] *Bhoobum Moyee's case*[10] is the starting point for the discussion as to the restrictions on the exercise of the power of adoption by the widow by reason of supervenient events. Widow's power of adoption with the sanction of sapindas is laid down in the *Ramnad case,*[7] which has been commented upon, followed and explained in numerous other cases which form highly interesting literature. Widow's powers of disposition are settled by *Vencata Narrainapah's case*[11] and other subsequent cases. The rule of *benami* is elaborated in several decisions in those volumes. The power of disposition by will and the limits of such disposition are also settled by *Soorjoomoney Dossee's case*[12] and other cases. The doctrine of son's liability for father's debts starts with *Hunoomanpersaud Panday's*

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1. (1863) 9 M.I.A. 544.
6 (1836) 1 M.I.A. 175
7 (1868) 12 M.I A. 397.
8 (1863) 9 M.I A. 199
9 (1856) 6 M.I.A. 393.
10. (1865) 10 M.I.A. 279
11 (1861) 8 M.I A 529.
12. (1857) 6 M.I.A. 526.

case.[9] The rule as to succession to mutts and the powers of matathipathis are considered in 11 and 13 M.I.A. The doctrine of alluvion, the rule as to succession to impartible estates, the incidents of many important tenures, the Lakhiraj, Ghatwali and other tenures in Bengal and the Polliem tenure in Madras were dealt with by the Privy Council with so much elaborateness that they have supplied abundant authority for the consideration of cognate questions.

In those early days, there were many Judges with curious notions of evidence and the Privy Council had occasionally to come in with somewhat elementary looking advice such as, a case cannot be decided on suspicion but only on evidence, that you cannot dismiss a man's case without consideration because he has produced a forged document or because he has uttered an untruth on one point and that if you borrow a rule of English equity, you should not borrow it without its qualifications. It must be said to the credit of the great English Judges who decided the cases in those volumes that they decided the questions relating to India freeing themselves from the technicalities of English Law and permitted the introduction only so much of English Law into India as was not conditioned by the peculiar historical and social circumstances of England. Nor can it be said that they disposed of cases without a complete discussion of the law on the subjects they had to deal with—even the Hindu Law subjects—at any rate when Sir Hugh Cairns and Sir Roundel Palmer appeared; for you will find the arguments and references are so complete that you wonder how that completeness was attained. Abundant references to authorities even now untranslated will be found in the arguments. The reports of Moore are the fullest that you have in any series relating to India. Complete history of the case from the start to the end, extracts and sometimes the full judgment of the Lower Court and the arguments of Counsel on both sides are given with a fullness which leaves nothing to be desired. The English of some of the judgments is magnificent and in fact has very little to compare with in later days. A reading through of those volumes is an essential pre-requisite to any lawyer in India who wants to master the principles of Indian Law. Some of the judgments of the Privy Council of this period are to be found in Acton, Knapp and Moore's Privy Council and so also in Morley's Digest. Most of the cases found in the Weekly Reporter, Sutherland's Privy Council judg-

9 (1856) 6 M.I.A. 393.

ments and the various High Court Reports are also to be found in Moore's Indian Appeals but a few of them are not so found and they will be found collected in Sanjeeva Rao's publication called the Indian Reports. The Judges that have taken part in these judgments are Lord Lyndhurst in *Freeman* v. *Fairlie,*[13] Lord Brougham in *Mayor of Lyons case,*[6] Baron Parke in some cases relating to contract, agency, etc., Knight Bruce, V.C., later L.J. in many cases like *Hunoomanpersaud Panday,*[9] *Gopeekrist Gosain*[11] (on *benami*) and *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick,*[15] Lord Kingsdown in *Bhoobum Moyee Debia's case*[10] and *Abraham's case,*[8] Lord Justice Turner in the *Sivaganga case*[1] and *Vencata Narrainapah's case,*[11] Lord Westbury is responsible for *Appovier* v. *Rama Subba Aiyan*[16] the leading case on partition and joint family, Dr. Lushington for the decision in *Ardaseer Cursetjee* v. *Perozeboye*[17] and Lord Justice James in *Umrithnath Chowdhry* v. *Goureenath Chowdhry.*[18] Sir James Colvile, the ex-Calcutta Supreme Court Chief Justice has to his credit a number of epoch-making judgments, *cf.* Ramnad adoption case (*The Collector of Madura* v *Moottoo Ramalinga Sethupathy*[7]), *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*[10] laying down the rule of reverter, *Bhugwandeen Doobey* v. *Myna Baee*[20] laying down the rule of limited power of disposition of the widow under the Benares School. He is also responsible for the judgment which lays down that the enumeration of the Bandhus in the Mitakshara is not exhaustive (*Gridhari Lall Roy* v. *The Bengal Government*[21]). He is responsible also for applying the English rule as to enforcing of conjugal rights to Hindus and Mahomedans. (*Moonsee Buzloor Ruheem* v. *Shumsoonnissa Begum*[22]). Knight Bruce and Turner, the two great Chancery Lawyers have to their credit the doctrine of *Benami, de facto* guardianship, the doctrine of inquiry supporting sale, and several matters relating to wills and future estates. Baron Parke, Lord Brougham and Lord Lyndhurst take part only in decisions relating to contract and general law. You find one curious feature, however; Lord

1. (1863) 9 M.I.A. 544
8 (1863) 9 M I.A 199.
6 (1836) 1 M I A. 175.
10 (1865) 10 M.I.A. 279.
12 (1857) 6 M.I.A. 526
15 (1862) 9 M.I.A. 123 at 134
17 (1856) 6 M I.A. 348.
19 (1866) 11 M.I.A. 139.
21. (1868) 12 M.I.A. 448.
7 (1868) 12 M I A 397.
9 (1856) 6 M.I.A. 393.
13 (1828) 1 M I A 305.
11. (1861) 8 M.I A. 529.
14 (1854) 6 M I A. 53
16 (1866) 11 M.I.A. 75.
18 (1870) 13 M.I.A. 542.
20. (1867) 11 M.I.A. 487.
22. (1867) 11 M.I.A. 551.

Chelmsford, an Equity Lawyer, setting his face in *Pattabirama Aiyar* v. *Venkatrao Naicken*[23] against the importing of equity doctrines into India and Sir James Colvile later on condoning such importation. (*Thumbusawmy Moodelly* v. *Hossain*[24].) All these English Judges have already become familiar to us in the course of our discussion of English reports and do not require a separate consideration now.

Though the various High Court reports were published by the Government through official reports there was no statute dealing with the subject. It was also felt that it was "expedient to diminish the multitude and expense of the Law Reports published in British India and to improve their quality." With a view to the furthering of these objects the Governor-General in Council proposed to authorise the publication of the reports of cases decided by the High Courts of Judicature and the Law Reports Act was passed. So far as one could judge there seem to have been only the Weekly Reporter and Indian Jurist in Calcutta and the Madras Jurist in Madras competing with the official publication. Even this was thought an intolerable multiplicity and it passes one's comprehension what the framers of the Act would have thought of the present multiplicity of reports. It is enacted by S. 3: "No Court shall be bound to hear cited or shall receive or treat as an authority binding on it the report of any case decided by any of the said High Courts on or after the said day other than a report published under the authority of the Governor-General in Council." This section gives the Government monopoly of publication but it does not take away the authority of unpublished precedents or give a published decision a higher authority than that possessed by it as precedent. As Chief Justice Maclean says in the case I have referred to already "that section was framed to constitute a monopoly if the Judges so desired for the authorized Law Reports. It only says that no Court shall be bound to have cited the report of any case, etc.; it does not prevent the Court from looking at an unreported judgment of other Judges of the same Court. This always has been done and can and ought to be done. A judgment is none the less an authority because it has not been reported. Otherwise the question of whether such a judgment could or could not be so regarded would depend upon the mere whim of the reporter." It is through the loophole thus provided, that private publications escape and the

23 (1870) 13 M I A. 560
24 (1875) L.R 2 I A 241 I L.R. 1 M. 1 (P.C).

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incompleteness and costliness of the official publications make them thrive. From time to time, however, protests are made, even by the highest tribunal the Privy Council against citation from private reports but the process is going on—even their Lordships not being above it.

THE CHILD MARRIAGE RESTRAINT ACT.

MR. P. R. GANAPATHI AIYAR, ADVOCATE, writes:

The above Act, more popularly known as Sarda's Act, has received the consent of the Governor-General and is stated to come into force on 1st April, 1930. The legislators who voted for the same when it was being passed in the Legislative Assembly congratulated the Government members and said that the passing of the same with the Government bloc was an epoch-making event. Those who voted against it and who think that the legislation as embodied in the Act is a tyrannical use of the powers of the majority thus got up also regard it as an epoch-making event. This aspect of the matter will be referred to on a future occasion.

Doubts are being expressed in some responsible quarters as to the validity of this legislation. It is highly necessary to consider whether such doubts are in any way well founded.

To consider the above it is necessary to see what the original Bill out of which the present Act grew was. The Bill, as originally introduced by the Hon'ble Rai Sahib Sarda, was not to prohibit Hindus to whom alone the above Bill was made applicable from performing marriages of their girls before puberty which, according to the religious law, ought to be performed by certain classes of Hindus or to compel people to perform post-puberty marriages but merely to make marriages of Hindu boys and girls below certain ages void with a proviso, however, enabling such persons as are bound by their religious law and feeling compelled to obey it to perform marriages even below that age under certain conditions. The condition is only to regulate the marriages, *viz.*, the taking out of a license from the Magistrate of the District who is bound to grant the same on the guardian stating on oath that he conscientiously believes that the religious law enjoins such a marriage.

The framer of the Bill in the Statement of Objects and Reasons appended to it states the object to be twofold: (1) To

put a stop to girls below 12 years of age becoming widows, and (2) to prevent the physical and moral deterioration of boys and girls by removing obstacles to their physical and mental development. We are not here concerned how moral deterioration comes in by marriages being performed and what mental development has to do with moral development or deterioration.

The two objects as stated in the Objects and Reasons were proposed to be effectuated by declaring invalid the marriages of girls below 12 years of age and of boys below 15 years with certain exceptions as stated already. The Bill though it affected a rule of Hindu Law of Marriage and, therefore, required the previous consent of the Governor-General, did not affect the sacramental character of the marriage and did not disable persons from performing certain religious rites. As Rai Sahib M. Harbilas Sarda expressly stated: "In order, however, to make the Bill accessible to the most conservative Hindu opinion, provision is made in the Bill that for conscientious reasons, the marriage of a Hindu girl would be permissible even when she is eleven years old." As stated in Medical Transactions, Vol. IX, Part I, at pp. 308 and 309: "Most of the females of this country begin to menstruate after the 12th or at the 13th year of their age." This is no new discovery. The Sage Apastamba as cited in the Smriti Chandrika states that girls attain puberty at 12.

When the principle of a Bill is accepted it is referred to a Select Committee. Indeed it is stated that the reference to a Select Committee presupposes that the Assembly in which the Bill is introduced and carrying the motion for Select Committee accepts the principle of the Bill. Even so, when the Select Committee to which the Bill is referred changes the principle of the Bill entirely and if this principle affects the religion or religious rites or usages of any class of His Majesty's subjects, the previous assent given by the Governor-General to a different principle which had also that effect cannot be taken to have relation to the new principle introduced by the Select Committee.

S. 67, sub-sec. (2) of the Government of India Act enacts: "It shall not be lawful, without the previous sanction of the Governor-General, to introduce at any meeting of either Chamber of the Indian Legislature any measure affecting . . . . (*b*) the religion or religious rites and usages of any class of British subjects in India." This clause is bodily introduced in the Manual of Business and Procedure of the Legislative Assembly as section 62-B.

If the principle for which consent was originally given was departed from and an entirely new principle be adopted, the tact that this entirely new principle is adopted by the Select Committee would not justify its being passed without the previous sanction of the Governor-General and the fact that the Governor-General subsequently gives his consent when it goes to him after passing both Houses cannot be taken to have any relation back or to dispense with the necessity for the previous consent.

The Bill introduced by Mr. Sarda was referred to a Select Committee and the Select Committee introduced many radical changes and indeed the Act as it stands at present is almost a reproduction of the Bill as changed by the Select Committee. The changes in so far as they bear on the present question as to the validity of the Act are in the main two: (*i*) The applicability of the Bill to all classes including Hindus and Mahomedans (when the original Bill applied in terms only to Hindus); and (2) penalising persons who perform what is styled as "child marriages." "Child" is defined to be a person who, if a male, is under 18 years of age, and if a female, is under 14 years of age, and "child marriage" is defined as a "marriage to which either of the contracting parties is a child". As it is admitted that a girl in India attains her maturity at the age of 12 or at the most 13, this legislation penalises persons who, according to their religious law, ought to marry their girls before puberty and as according to such religious law a girl married after puberty is a "Vrishali" and the husband of such a girl is a "Vrishalipati" unfit and disqualified to perform or be associated with the religious rites prescribed for such persons by their religion, this new principle as evolved by the Select Committee and as now passed affects the religious rites and usages of such persons.

Indeed, the Select Committee which thus radically changed the Bill recognised that the Bill as changed by it was a new one. According to them, the original Bill declared that marriages below certain ages void, that this elicited a strong expression of feeling that it was objectionable and that they had to recognise the objections to be insuperable. To obviate this they say they introduce a new Bill to effectuate according to them the original object. The fact, however, is it is a new Bill. They say: "We do recognise that the substitution in Select Committee of what is formally a new Bill is an unusual step."

According to sub-section (2) of section 67 of the Government of India Act, as already stated, "It shall not be lawful, without the previous sanction of the Governor-General, to introduce at any meeting of either Chamber any measure affecting the religion or religious rites and usages," etc. The section is explicit It shall *not be lawful* at all *to introduce* at any meeting a Bill of that nature. The original Bill *had no reference to the Mahomedans*. The Bill *as changed* by the Select Committee and as now passed affects *Muslims*. It affects the liberty given to the Muslims under their religious law. This is a violation of the provision contained in sub-section (2) of section 67 as aforesaid. Then again, the original Bill did not affect the sacramental character of a Hindu marriage. The Bill as amended by the Select Committee and as now passed vitally affects the sacramental character of marriage by penalising persons compelled to perform the marriages of their girls before puberty under their religious law resulting in the disqualification of persons marrying according to its provisions from performing the religious rites prescribed by their religion. This principle has not received the previous sanction of the Governor-General without which it is not lawful to introduce at all a measure involving such principle. Indeed, as already stated, the Select Committee recognised the Bill as changed by it as substantially a new Bill. Now the Indian Legislature has no power of legislation apart from the Government of India Act and can exercise powers conferred upon it by the said Act subject to the conditions and restrictions imposed by it. The consideration of the Bill by the Indian Legislature as changed by the Select Committee is, therefore, entirely *unlawful* and is, therefore, *ultra vires* of its powers and such an Act is, therefore, invalid and entirely illegal.

The above result is also in accordance with the other provisions of the Government of India Act. S. 84 deals with the question of validity of Indian Laws. It enacts by sub-section (1) that "A law made by any authority in British India shall not be deemed invalid solely on account of any one or more of the three reasons mentioned therein." The three reasons stated have no reference to the present question. Sub-section (2) of section 84 declares that "the validity of any Act of the Indian Legislature or any local legislature shall not be open to question in any legal proceedings on the ground that the Act affects a provincial subject, or a central subject, as the case may be, and the validity of any Act made by the Gover-

nor of a province shall not be so open to question on the ground that it does not relate to a reserved subject." This section only prevents Courts from declaring an Act of the Indian Legislature invalid on the ground that the Act dealt with by the Indian Legislature affects a provincial subject. This, therefore, supports the view that the Act of the Indian Legislature can be questioned on other grounds and where the Government of India Act has enacted that it *shall not be lawful to introduce* certain measures *without previous sanction*, a *violation* of such an *express mandatory provision* will render an Act relating to such measures *invalid* and it will be open to Courts to question the validity of the Act on such a ground.

It may be noticed that the language employed with reference to a law enacted by the Indian Legislature [section 67, sub-section (2)] is in striking contrast to the provision enacted by the Government of India Act with reference to a law made by the local legislatures. As regards such local laws the proviso to sub-section (3) of section 80-A of the Government of India Act expressly declares that "an Act or a provision of an Act made by a local legislature, and subsequently assented to by the Governor-General in pursuance of this Act shall not be deemed invalid by reason only of its requiring the previous sanction of the Governor-General under this Act." This is only consistent with the enacting clause in sub-section (3) which merely says that "the local legislature *may not,* without the previous sanction of the Governor-General under this Act." Here it is only permissive. The provision as to previous sanction is *not so mandatory* as in the case of the Legislative Assembly. With reference to the latter the language of section 67 of the Government of India Act as already stated is very explicit. "It shall not be lawful" to introduce at all without previous sanction. The fact that in section 80-A it is specifically provided that the want of previous sanction in the case of local legislature does not invalidate an Act while no such similar provision is made in the case of an Act of the Legislative Assembly is very significant.

No doubt where the Legislature is supreme, it may be that the fact that the forms of procedure have not been strictly followed but nevertheless a Bill has been passed through both Houses and has received the Royal Assent cannot affect its validity and the Act cannot be impeached on the ground that the forms of procedure have not been followed. But even in England where the English Parliament is supreme, a Bill requires the assent of both Houses of Parliament and the con-

sent of the King; so that when legislation was enacted to make a Bill passed by the House of Commons solely into an Act notwithstanding the refusal of the House of Lords to pass the same, when certain conditions are complied with, it has been found necessary to provide specifically that the certificate of the Speaker of the House of Commons that the provisions of the Statute has been complied with shall be conclusive and shall not be questioned by any Court of Law. *See* section 3 of 1 and 2 Geo. V. c. 13. But for this provision it would have been open to Courts to consider whether the conditions prescribed by the Statute have been complied with. This only strengthens the view that in India where the Indian Legislature has only such powers as are conferred by the Statute (The Government of India Act) and those powers can be exercised only subject to the conditions and restrictions prescribed therein, and there is no provision in the Statute as in S. 3 of 1 and 2 Geo V. c. 13, Courts are at liberty to consider whether the conditions have been complied with and to declare invalid a law passed not in accordance with such conditions and restrictions.

It is only necessary to consider the provision in section 84 which enacts that "A law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall, to the extent of that repugnancy, but not otherwise, be void" This provision only applies to a case where an Act has been passed after complying with all the formalities prescribed by the Government of India Act but some of the provisions are contrary to the provisions of this Government of India Act or any other Act of Parliament. It has no application to a case where the formalities prescribed by the Government of India Act or the rules framed thereunder for the passing of a measure into a law have not been observed.

It is thus clear that the Child Marriage Restraint Act is invalid and cannot be regarded as having any binding force.

SUMMARY OF ENGLISH CASES.

CLAN LINE STEAMERS, LIMITED *v.* BOARD OF TRADE, (1929) A.C. 514.

Shipping—Charterparty T. 99—Vessel requisitioned by Crown—Charterparty excluding marine risks but accepting liability for consequences of warlike operations—Steering gear

breaking down—Consequent collision with another vessel engaged in warlike operations—Sinking—Liability under the charterparty.

A vessel *Clan Matheson* was requisitioned upon the terms of a Charterparty T. 99 which excluded liability for marine risks but insured against loss from warlike operations. When this vessel was sailing in convoy with other vessels in columns, her steering gear broke and as a result she swung right across the bows of another vessel *Western Front* which was then admittedly engaged in warlike operations. The *Clan Matheson* was not then so engaged In an action against the Crown for loss,

Held, negativing the claim, that it is a well-settled principle of marine insurance law that *causa proxima non remota spectatur.* But this does not mean that everything which happened before the actual impact took place should be excluded. By the breakdown of the steering gear, *Clan Matheson* was a lost ship and that misfortune should be regarded as the real and proximate cause of the loss, though the loss would not have occurred had not the *Western Front* been in the position in which she in fact was.

Lord Sumner's remarks in *Attorney-General* v. *Adelaide Steamship Co*, (1923) A.C. 292 approved and followed.

BOARD OF TRADE *v.* HAIN STEAMSHIP CO., LTD., (1929) A.C. 534.

Shipping—Charterparty T. 99—Requisitioned vessel—Vessel proceeding from United States to England laden with a cargo of oats—Collision with another United States vessel carrying mines—Both vessels to blame—If loss due to warlike operations.

Under the same Charterparty T. 99, a steamship *Trevanion* was requisitioned during the war with liability to loss by warlike operations. After the Armistice in 1918, but before war operations had ceased, *Trevanion* was proceeding from United States to England laden with oats. It collided with another vessel coming opposite with mines and was seriously damaged. It was found that both vessels were to blame.

Held, that if a vessel is engaged on warlike operations and collides, the negligence of the warship does not prevent the collision being a consequence of warlike operations; and the

fact that the contributory negligence of the other ship contributed to the collision makes no difference.

Attorney-General v. *Adelaide Steamship Co.* (*The Warilda*), (1923) A.C. 292 followed.

FRENKEL *v.* MACANDREWS & Co., (1929) A.C. 545.

Bill of Lading—Destination Liverpool—Liberty to touch ports outside the route—Vessel deviating from direct route—Accident during deviation—No express statement in Bill of Lading of the course of voyage—Parol evidence to prove liberty to deviate—Admissibility of.

A merchant of Malaga shipped oil per S.S. *Cervantes* of the respondents' fleet to Liverpool and the Bill of Lading merely gave the destination as Liverpool without stating the course of voyage and added "Liberty to touch at any ports whatsoever although they may be outside the route without it being considered a deviation.........." It was found that the respondents would call at Malaga either first as in this case or on their return journey from Mediterranean. The steamship loaded cargo at Malaga and instead of going to Liverpool direct deviated towards Cartagena and in that deviation was swung by a gale and caused loss to the oil. In an action for damages, it was contended that parol evidence was inadmissible to prove the customary deviation and that the accident having occurred outside the contract route, the exemption clause in the Bill of Lading cannot be availed of.

Held, the route of a vessel declared to be lying at one port and bound for another must be construed as a direct route and the circumstance of knowledge that it was not or might not be direct will not affect that construction It will only permit calling at those ports which are on the course of the voyage, although not exactly the sea course which the ship would take. But that principle will not apply to a case where there is no port of *departure* and a port of *destination* so named in the Bill of Lading and if there are two routes followed, evidence is admissible to prove them, as either can be included in the Bill of Lading.

Leduc v. *Ward*, (1888) 20 Q.B D. 475 and *Margetson* v. *Glynn*, (1892) 1 Q.B. 337; (1893) A.C. 351 distinguished.

CHAPMAN OR OLIVER *v.* SADDLER & Co., (1929) A.C. 584.

Negligence—Death of a dock labourer while engaged in receiving cargo—Rope sling giving way and bags falling on him—Accident after stevedores' duty ended and duty of receivers of cargo begun—Liability for negligence whether stevedores' or porters' (receivers)—Customary to the porters to use the same rope slings for their portion of work.

While a load of bags was being swung by the shore crane over the staging on the quayside, the rope sling that held the bags gave way and the bags fell on the deceased who was engaged as a dock labourer by the porters to receive the bags and remove them to the quay. The accident having happened after the bags were placed on the steelyard, from which stage the porters' duty began, it was contended that the stevedores were not liable for the accident to the porters' servant. It was found (*i*) that it was the duty of the stevedores to provide the ropes and in fact they had a man to make the slings and examine them before use; (*ii*) that the porters rely for the safety of the sling on the care of the stevedores, and (*iii*) that the stevedores also knew that the porters rely on them solely. In fact the nature of the business is such that the porters can have no real opportunity to examine.

Held, the stevedores under the circumstances were not in the same position as gratuitous bailors. The circumstances of the case, namely, the knowledge of the stevedores that it will be used in a dangerous operation, and that the only persons who could inspect were themselves, raised a duty on their part to take proper steps to see that the ropes were safe, and failure in that duty rendered them liable for negligence.

Caledonian Ry. Co. v. *Warwick,* (1898) A.C. 216 distinguished.

HYMAN *v.* HYMAN, (1929) A.C. 601.

Divorce—Covenant by the wife in a deed of separation not to sue for increased alimony or maintenance—Decree for dissolution of marriage on the ground of husband's adultery—Wife if can go behind the covenant and claim increased maintenance.

A covenant by the wife, contained in a deed of separation, not to take any action in England or elsewhere to compel the husband to allow her any alimony or maintenance beyond a sum agreed to between them by the deed of separation, does not

preclude the wife from petitioning for maintenance under S. 190, Supreme Court of Judicature (Consolidation) Act, 1925, after she had obtained a decree for divorce. The Court will take into consideration the amount agreed to and fixed in the separation deed in calculating the amount of maintenance.

Gandy v. *Gandy*, (1882) 7 P.D. 168 doubted and distinguished.

Bishop v. *Bishop*, (1897) P. 138 approved.

MAINE AND NEW BRUNSWICK ELECTRICAL POWER COMPANY, LTD. *v.* ALICE M. HART, (1929) A.C. 631.

Interest—Sale of land and water rights—Conveyance for power works—Covenant to pay an extra sum if water-power beyond 2000 horse-power were developed and used—Each extra unit to be "immediately paid for"—Construction of covenant—Interest on extra sums payable—Contract silent as to interest—Interest if allowable—Amount and time depending upon the power developed and on the contingency of excess being developed.

By means of a contract of sale, land and water rights were purchased by the defendants for the purpose of developing water-power from the Aroostook Falls near by for electrical purposes. The defendant company, among other terms, which were all executed, also covenanted that if water-power to a greater extent than two thousand horse-power should be at any time developed and used, the said company shall pay the vendor or his representatives an extra amount per each extra unit developed immediately as and when it is so developed and used.

Held, the water-power in the agreement does not mean the average power produced over a reasonable period of time and the defendants were liable to pay for excess immediately upon each occasion when any excess power is developed and used. Also as the covenant does not provide for interest on the payments and the liability to pay and the amount to be paid being contingent upon an uncertain event happening "there is no sum certain payable by virtue of a written instrument at a certain time" within the meaning of the New Brunswick Judicature Act, 1909, which is the same as the English and Indian enactments. Further the contract being fully executed on both sides, the action being upon the covenants which do not give interest, the plaintiff cannot claim interest unless it is given to him at common law or under statute. In such a case there is no place for the exercise of equitable jurisdiction.

TUNOCH *v.* BROWNIESIDE COAL CO., LTD., (1929) A.C. 642.

Workmen's compensation—Accident in the course of employment—Physical discovery but disfigurement by blinding the eye—Consequent failure to obtain employment—"Recovered from the injury as to be fit for employment of a certain kind"—Meaning of—Whether includes workman's employment at the time of the injury.

The applicant, a miner, sustained injuries as a result of which he completely and permanently lost the sight of his right eye but was physically able to resume his former employment and earn his former wage. The workman tried his best to secure an employment as a miner or quarryman, but the blindness of his eye stood in the way of his securing one. The question if the workman is entitled to compensation on the basis of total incapacity, when the workman had physically recovered so as to be able to perform his former work,

Held, the workman was entitled to compensation on the basis of total incapacity. What S. 9 of the Act contemplates is a man injured recovering so as to be fit for work, but not fully recovered, that is being still left with a disability due to the accident which prevents him from getting employment and earning. "Employment of a certain kind" in S. 9, sub-section (4) includes also the workman's original employment at the time of the injury.

View of Viscount Dunedin as to what is meant by kind of work in sub-section (4) altered as being too absolute.

WILSONS AND CLYDE COAL COMPANY, LTD. *v.* BURROWS, (1929) A.C. 651.

Workmen's compensation—Reference to medical referee to examine about the condition of the workman—Referee's certificate stating workman 'completely recovered'—Application before arbitrator to remit back for further examination as to the possibility of recurrence of incapacity—Power of arbitrator to remit—Workmen's Compensation Act, 1925, *S.* 19.

At the instance of the employer, a workman, who was receiving compensation, was examined by a medical referee who certified that the workman "had completely recovered and was fit for his ordinary work." The employer thereupon applied to the arbitrator to end the payments and before the arbitrator the workman produced a skiagram taken at the Royal In-

firmary disclosing latent conditions probablising the recurrence of the incapacity and moved for remitting the case to the medical referee for further examination in that light and passing a suspensory award.

Held, the arbitrator had authority to pass a suspensory award if the report of the medical referee showed that there was, in spite of a perfect ability to work at the moment, some latent lesion which may probably break out in the future as the result of the accident. But where the referee who had the whole question as to the condition of the workman—including in that not only the present but the future condition as well—issues an unambiguous certificate stating that he has completely recovered, the certificate is binding on the arbitrator and he has no capacity to remit it back to him for further enquiry in the light of the skiagram inspection.

HALL *v.* PELMADULLA VALLEY TEA AND RUBBER CO., (1929) A.C. 662.

Registration—Ceylon Trusts Ordinance No. 9 of 1917, S. 93—Prior contract to sell—Subsequent purchase with notice of the contract—Prior contract unregistered—Non-registration involving no breach of the registration law—Not registered because properties to be sold were not then ascertained—Subsequent purchase if subject to the contract to sell.

By a contract to sell, one *T* agreed to convey certain land of which he was not then possessed to the defendant company, after acquiring it himself. This contract was unregistered and could not be registered also as no sufficiently definite description of the lands affected by it could be given. The defendants were in anticipation of such acquisition allowed by *T* to take possession. The lands were acquired in 1921 and in 1923 he conveyed the same to the plaintiffs by a registered sale-deed. This action was brought by the plaintiffs for recovering possession. It was found that the plaintiffs had, at the time of sale, notice of the contract to sell.

Held, that to entitle the defendant to the benefit conferred by S. 93 of the Trusts Ordinance of 1917 (Ceylon), the prior registration of the contract to sell is made a condition precedent and the fact that the non-registration was due to the fact that it was not capable of registration did not entitle the Court to relax the condition. The object in the mind of the legislature in imposing such a condition, even if it could be known, would not affect the meaning of the words used.

[S. 93.—Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. Provided that in the case of a contract affecting immoveable property, such contract shall have been duly registered before such acquisition.]

CHEARIG THYÉ PHIN *v.* LAM KING SANG, (1929) A.C. 670.

Trustee—Limitation—Advance by trustee (i) to himself, and (ii) to third persons—Interest on—Claim to principal barred—If claim to interest also barred—Advance to agent before statutory period—Alteration in books to principal's name within 12 years—If brings the debt within limitation period—Limitation Ordinance (Straits Settlements), 1896.

In a suit brought by the personal representative of two persons entitled to share in the income of a portion of the estate of one *C*, as to which portion he died intestate, against the executors and trustees of the estate of the testator *C*, an account as from March, 1908, of the receipts and payments was directed, it being held that the claim to share of income prior to that was barred by limitation. On taking accounts among other items, the Court allowed also (1) interest on an item which was money lent to the trustee himself before 1908, (2) interest on certain advances made by the trustee prior to that date to a third person *A*, and (3) on the principal on item (2) which was paid away before March, 1908 to *A's* agent and entered in agent's name but altered to principal's name after March, 1908.

Held, as regards (1), the advance being to the trustee himself, he becomes only a debtor to the estate and no question of wilful default arises. Consequently on the principle of *Hollis* v. *Palmer*, (1836) 2 Bing. N.C. 713, interest being merely an accessory to the principal, it cannot also be recovered. That rule cannot apply in case (2) as this sum was due not from the trustee himself but from a third person with whom there was a special contract to pay interest at a specified rate As for (3) the alteration into principal's name was not the record of a new debt but merely transfer of the old debt paid away before the crucial date and as such should be excluded from the account.

In re COCKERILL. MACKANESS *v.* PERCIVAL, (1929) 2 Ch. 131.

Will—Devise of land to A *absolutely subject to payment of annuities, road charges and death duty—Land to be offered to* B *at a fixed figure if* A *should sell it within a particular period —*B *to bear annuities and road charges—*B *if should also bear death duty—*A, *if bound to offer to* B.

By his will, a testator devised land in favour of *A* absolutely subject to and charged with the payment of certain annuities, outstanding charges for a road which he was making, and estate and other death duties But if the said devisee *A* should be desirous of selling the property within 20 years of his death, the devisee should offer it first to a named person *B* at 300*l.* per acre, such offer to be subject to the payment by *B* of the said annuities and road charges. The properties were so sold to *B* and the question arose if *B* should pay the death duty or *A*.

Held, by Eve, J, that *A* should pay it because (1) *B* took the property not under the devise but by the voluntary sale by *A*, *A* not being bound to sell at all, (2) the testator by omitting the death duty in the list of charges to be borne by *B* indicated his intention that the purchaser *B* was not to be subject to any such liability, and (3) the restriction on alienation by *A* is void for repugnancy and therefore the devisee was free to have sold the property without first offering it to *B*.

Muschamp v. *Bluet,* (1617) Sir J. Bridg. 132 and *In re Rosher,* (1884) 26 Ch.D 801 followed.

A DEBTOR, *In re,* (1929) 2 Ch. 146.

Bankruptcy—Decree nisi *in a divorce suit—Respondent ordered to pay the petitioner's costs to the petitioner's solicitors —Solicitors to collect and lodge the amount into Court—Failure to pay—Bankruptcy notice issued by the solicitors—Non-compliance with the same—Bankruptcy petition—If sustainable —If the order is a* "final *order*"*—If solicitors are "creditors."*

After a decree *nisi* in a divorce suit, an order was made by the Divorce Court directing the co-respondent to pay to the solicitors of the petitioner a sum as for the costs of the proceedings, the solicitors to lodge such amount into Court. Shortly after, the decree *nisi* was made absolute. The costs not having been paid, the solicitors issued to the co-respondent a Bankruptcy notice and on non-compliance filed the petition

in Bankruptcy. The question being raised if the order for costs was a "final order" and the solicitor a "creditor" within the meaning of S. 1, sub-sec. (1) of the Bankruptcy Act, 1914,

Held, by the Court of Appeal, that the order did not purport to finally determine the rights of the parties to the sum mentioned in it and was only an interlocutory order. The direction to pay into Court showed that it was to be the subject of a further and future order.

Per Lord Hanworth—The petitioning husband, for whose indemnity the costs were awarded, was alone the principal "creditor" and the solicitors were merely acting as a necessary part of the machinery by which to reach the creditor.

In re SILVA SILVA *v.* SILVA, (1929) 2 Ch. 198.

Lunacy—A person of unsound mind not so found by inquisition—Purchase of a freehold house as a residence out of funds belonging to the lunatic by order of Court—Order of Court silent on whether the house should retain the character of the fund or not—Effect of purchase—Rights of the heir and next-of-kin in the house.

By an order of the Court, a freehold house was purchased out of funds belonging to the lunatic and left with his wife in trust for the lunatic. The purchase was made in the ordinary course of management to provide a house for the residence of the lunatic. The lunatic died issueless, his wife having predeceased him. The order of the Court was silent as to whether the property so purchased was to be preserved to the next-of-kin as personalty.

Held, the purchase being in the ordinary course of management, the Court need not be expected to pay any more regard for the interests of those coming after the lunatic than the lunatic would have done if he had made the purchase himself. The property will therefore go to the heir as reality unless the Court had directed otherwise in the order for conversion as was done in *Attorney-General* v. *Marquis of Ailesbury*, (1887) 12 A.C. 672.

In re Searle, (1912) 2 Ch. 365 followed.

LOWE, *In re.* STEWART *v.* LOWE, (1929) 2 Ch 210.

Legitimacy—An illegitimate son and daughter—Son dying before January 1, 1927*—Marriage of parents after the child-*

ren's birth—Death of mother intestate—If son of the illegitimate son entitled to share in the mother's estate—Legitimacy Act, Ss. 1, 3, 5 *and* 9.

A had two illegitimate children, a son and a daughter born at a time when she was free to have married their father. She subsequently married him in 1905. The son died prior to 1st January, 1927, leaving one child and the question arose if that child could inherit to *A's* estate on *A's* death intestate.

Held, that to render *A's* son legitimate, he should have been living at the commencement of the Act, the marriage having been earlier. The daughter having been then living became legitimated by law. S. 9 cannot help the grandson, for *A* left behind a legitimate daughter which gives her the status of legitimacy as though born legitimate.

GREEN *v.* WEATHERILL, (1929) 2 Ch. 213.

Res judicata—*Suit against a married woman trustee—Action on basis of a breach of trust—Decree against her separate estate in* Scott *v.* Morley, (1887) 20 Q.B.D. 120 *form—Subsequent action on foot of her being a trustee—Payment by her to her sister after pleadings in the prior action had closed—Payee receiving with knowledge of the action and the claim thereunder—If can be sued as a constructive trustee.*

A testator by his will, among other bequests, devised a sum of 200*l.* in favour of certain persons which during his lifetime he had handed to his daughter to invest for him. The said daughter denied the entrustment and consequently the executor brought an action against her to recover the amount and got a decree payable out of the separate estate of the daughter. But after the pleadings in the suit had been closed, and the case set down for trial, the defendant daughter had paid out 135*l.* to her sister, who knew all about the action but was not made a party to that suit. Execution of the decree taken out in respect of the judgment was therefore unproductive and this action was commenced against the two sisters on the allegation that the daughter withdrew all the capital sum from the Bank with a view to defraud the just claim under the will and that the sister at the time when she received the amount knew or had notice of all the necessary facts.

Held, an action against a married woman who is a defaulting trustee may either proceed (*i*) on the basis of her having

committed a breach of trust and therefore to that extent rendering her separate estate liable for it, or (*ii*) on the basis that she is a trustee possessed of trust moneys which it is desired to place in safe custody. Judgment against the daughter having been recovered on one basis, it is not open to obtain a judgment in a different form by establishing practically the same facts. But the sister having received the amounts after the pleadings in the prior action closed, she becomes a constructive trustee of the sums paid to her with full knowledge of the action and is bound to pay the amount to the executor.

CURTIS MOFFAT, LIMITED *v.* WHEELER, (1929) 2 Ch. 224.

Vendor and purchaser—Under-lessee not to assign without lessee's consent—Under-lessee selling his interest—Contract silent about lessee's consent and also about purchaser's right to assign—Lessee refusing consent to purchaser but agreeing to purchaser's nominee—Purchaser agreeing subject to his solicitor's approval of title—Meaning of—Under-lessee's liability—Under-lessee if bound to consent to sale to his purchaser's nominee.

An under-lessee of certain properties agreed to sell to the plaintiffs her under-lease interest for a certain sum subject to plaintiffs' solicitors' approval of title. Her under-lease contained a covenant that she should not assign to any person whom the lessee will not agree to. The lessee refused to consent to the assignment on reasonable grounds but was willing to consent in favour of a nominee put up by the plaintiffs. The defendant under-lessee refused to agree to that. In an action for specific performance of the contract to sell, it was contended (*i*) that the solicitors had not approved the title within a reasonable time, (*ii*) that the lessee refused to consent to the assignment thereby rendering performance impossible, and (*iii*) that the defendant was not therefore bound to proceed with the contract in favour of any nominee.

Held: "Subject to the approval" is a common term in contracts as the purchasers in their own interest would desire expert legal advice of a solicitor, which advice must be reasonable and given in good faith. But in the case, the title was approved within a reasonable time. The contract being silent as to the lessee's licence to assign, it was the vendor's duty to do everything in her power to obtain the necessary licence and having failed in it, she was liable in damages to the purchaser. But as

the lessees refused to consent to the assignment in favour of the plaintiffs, there can be no specific performance to sell to them. Yet there being no restriction against assignment in plaintiffs' contract, the under-lessee was bound to assign in favour of a solvent nominee, so long as the plaintiffs are willing to join in the assignment to the nominee for the purpose of guaranteeing to the defendant the performance of the covenants by him.

ALDRIDGE *v.* WRIGHT, (1929) 2 K.B. 117.

Easement—Right of way—Neighbouring tenements—User of the pathway ever since the first tenancy of the dominant tenement—Both tenements originally owned by one—Assignment of the servient tenement without reserving the right of way—No express grant of way proved—Assignment of dominant tenement later—Right of way if can be deemed to be impliedly reserved—Rule in Wheeldon *v.* Burrows.

In 1895, a freeholder granted two building leases over two of his adjacent lands. In pursuance of it two buildings were raised Nos. 28 and 30. The leases did not contain any indication that there was to be a right of way across No. 30 for coal, rubbish, etc., being taken to and from No. 28. But it was found that ever since the first tenant of No. 28 occupied it, there was down to the time of suit a way enjoyed—the right of enjoyment not being clear—from No. 28 to the road next to No. 30 through No. 30. In 1901, the lease of No. 30 was assigned to the plaintiff's predecessor-in-title and in 1927 the lease of No. 28 was assigned to the defendant. The assignments being silent about the way, the question arose if there was to be implied in the assignment of No. 30 the usual right of way in favour of No. 28.

Held, by the Court of Appeal, the general rule is that on a severance of two properties anything like a right of way or other easement will be impliedly intended to be granted only if it is such as is reasonably necessary for the reasonable and effectual use of the part granted and that is based on the principle that a man shall not derogate from his grant. Unless a case falls under this rule known as the rule in *Wheeldon* v. *Burrows,* or some well-known exceptions to it discussed in the judgments, no reservation can be implied.

Wheeldon v. *Burrows,* (1879) 12 Ch.D. 31 followed.

FROST *v.* CASLON. FROST *v.* WILKINS, (1929) 2 K.B. 138.

Election Law—Representation of the People (Equal Franchise) Act, 1928, *S.* 1, *sub-secs.* (1), (2) *and* (3)—*Registration as voter—Occupation "for the purpose of the business of the person to be registered"—Director of a company occupying a room in the company's buildings on a rental—A room in a building if a "premises".*

A director of a limited company by an agreement with the company had an exclusive tenancy of a room in the company's premises to carry on his duties of director and the agreement entitled him to exclude every one, even his co-directors, who might desire to enter it. The question arose if such an occupation entitled the director to be registered as a voter under the Representation of the People (Equal Franchise) Act, 1928.

Held, by the Court of Appeal (Scrutton, L.J., dissenting) that the room was occupied by the applicant to do his work of managing director of the company and that it did not cease to be *his business* because it involved management of the company in the company's premises. Even per Scrutton, L.J., he will be entitled to be registered if in addition to the directorship of the company he carries on other businesses there.

Per curiam.—"Premises" are wide enough to include even 'part of a premises' provided it is capable of being 'occupied' within the meaning of S. 3.

CARLTON HALL CLUB, LTD. *v.* LAWRENCE, (1929) 2 K.B. 153.

Gaming—Money lent with knowledge that it is to be used for gaming in England—Security obtained therefor—Suit not on the security but on the consideration—If maintainable—Gaming Act, 1710, *S.* 1 *and* 1835, *S.* 1.

A proprietary club lent moneys to the defendant with the knowledge that it was to be used in England for playing at Poker and Snooker and took a cheque therefor. But as a suit on the cheque will be bad, the club brought this suit as money due under an agreement made before the loan.

Held, that where money is lent for the purpose of playing a game which is unlawful in England, then if the game is played in a foreign country where the game is lawful, money can be recovered in English Courts; but if the game is played in

England, then the statute of gaming avoids not only the security but by implication the consideration also and hence the amounts cannot be recovered.

Majority view in *Moulis* v. *Owen*, (1907) 1 K.B. 746 followed.

KIRKBY *v.* MINTY, (1929) 2 K.B. 165.

Local Government—Omnibus carrying greater number of passengers than certified—Proceedings against conductor—Prosecution commenced without the order of the Commissioners of Inland Revenue—Proceedings if competent—S. 21, *Inland Revenue Regulation Act,* 1890.

A Superintendent of Police preferred an information against a conductor of an omnibus for carrying a larger number of passengers than it was licensed to, but no previous order from the Commissioners of Inland Revenue was obtained to commence the proceedings.

Held, that considering the later repeals of the Railway Passenger Duty Act, 1862, what remains of the Act is not an enactment "relating to inland revenue" and therefore no previous sanction is necessary. Further, per Lord Hewart, C.J., the prosecution comes within the exception in section 21, sub-section (2) of the Inland Revenue Regulation Act, 1890, it being a "proceeding on information of an officer of the peace".

SHEFFIELD CORPORATION *v.* LUXFORD. SHEFFIELD CORPORATION *v.* MORRELL, (1929) 2 K.B. 180.

Landlord and Tenant—Due notice to quit given of the tenancy—Tenant defaulting to give possession—Suit to recover premises—Court's discretion in ordering possession—S. 138, *County Courts Act,* 1888—*Undue postponement of possession if proper discretion.*

Two weekly tenants of dwelling houses were given due notice to quit but refused to give up possession. In an action to recover possession from them, the County Court Judge refused to make any order against one, and as against another postponed the delivery of possession by 12 months, holding that he had a discretion under S. 138, County Courts Act, both as to giving possession and as to the date at which possession is to be given.

Held, that though the language of the Act is permissive and not compulsory, yet as soon as the conditions necessary to bring a person within the statute are fulfilled, he becomes clothed with a legal right which entitles him to apply to the Court to be enforced in his favour. The due notice to quit having been given, the legal right of the landlord was complete and the tenant's right to remain in possession had absolutely ceased. The Court had then only the discretion to postpone delivery of possession, which discretion must be judicially exercised having regard to the nature of the tenancy, the term and the object which the legislature must be taken to have had in the enactment, and ought not to be so exercised as to deny the landlord of the justice which he is seeking.

THE YORK, (1929) P. 178.

Contract—Shipping—Collision—Damage—Damage not rendering the steamship unseaworthy—Contract to sell—Seller to open up at his expense the engines, etc., for the inspection by the purchaser—Repairing the collision damage while so opened up—Not fit to trade when opened up—Liability due to collision.

A merchant vessel collided with another steamer in the midsea but the collision was slight and did not render the vessel unseaworthy. The vessel continued its voyage notwithstanding the collision. Admittedly the collision needed four days repair. While so trading and after the collision, the owners of the vessel entered into a contract to sell her to a Greek merchant and under the terms of the contract agreed to open up the engines, etc., for inspection by the purchaser. In pursuance thereof, the owners opened up the engine, boilers, etc., and also made use of the opportunity to repair the collision damage. It was agreed that when the steamship is opened up, it cannot trade. The colliding vessel was ordered to pay (*i*) the costs of the repairs, and (*ii*) the loss in trade profit by being detained for the four days without trade. On appeal against the second count,

Held, reversing Bateson, J., that damages are intended to be a compensation for loss caused by the wrongful act of the defendant except in certain special cases where there is an absolute rule of law entitling a man to a particular measure of damage, whether in the events that have happened he has suffered that damage or not. In this case, even if the wrong (collision) had not been done, still the owner would have lost the

use of the vessel and consequently trade profits for the four days in question, because he was obliged by his engagement under the contract to open up the ship. The fact that he was not able to trade had nothing to do with the collision and it could not be said that "work, which she would otherwise have done during the time, went undone to his measurable loss."

The Strathfillan v. *The Ikala,* (1929) A.C. 196 followed.

THE YOUNG SID, (1929) P. 190.

Costs—Discretion of Judge—Interference in appeal.

There is no appeal from the discretion of a Judge as to costs, provided the Judge has exercised it judicially and did not deal with matters which had absolutely no connection whatever with the case. To lay down a hard and fast rule as to costs will be to fetter the Judge's discretion which must be exercised in each individual case on its own merits.

JOTTINGS AND CUTTINGS.

Lord Halsbury.—A life of any public man which comprised expeditions with smugglers and going up to Oxford by stage coach at its one extremity, and, at the other, poison gas and votes for women, must needs have an attraction for the reader; how much more so then when the career in question is that of a man like the late Lord Halsbury. Wonderful, however, as Mrs. Wilson-Fox's Life is as a record of varied experience, it will be more valued by lawyers for the light which it sheds on Lord Halsbury's attitude towards the legal problems and movements of his day. The part which he played in the difficult days of the passing of the Parliament Act of 1911 is probably fairly well known, but not every member of the Profession knows or remembers how enthusiastically he championed the cause which was embodied in the Criminal Evidence Act of 1898, which departed so far from the standpoint of the common law as to provide that "every person charged with an offence, and the wife or husband, as the case may be, of the person so charged shall be a competent witness for the defence . . . whether the person so charged is charged solely or jointly with any other person." Letters are reproduced which show the difficulties introduced by *Reg* v. *Thompson* and the attitude towards the question generally

of men like Sir Herbert Stephen, Mr. Justice Hawkins, and Sir Harry Poland, the last named of whom refers to the case of two prisoners tried together before Mr. Justice Gurney, where each wanted to call his wife. A. was told he could not call his wife, but the other, B., said: "My Lord, I am not really married, although we have been living together as man and wife for many years. Can I call Mrs. B."? "Oh, certainly," said the Judge, "you may call her, as you are not married." "The law," the writer concludes, "is in a discreditable and disgraceful muddle." There seems to be some slight confusion in the biographer's mind as to the dates of the Criminal Evidence Act and the Criminal Appeal Act which, nine years later, crowned the movement for the relief of the accused, an Act as to the wisdom of which authoritative opinion was again, it will be recalled, sharply divided. One other and very different episode will be noted with interest, namely, the manner in which Lord Halsbury came to have the unique distinction of possessing a Great Seal. Custom demanding that the old Seal should be broken up when, in 1897, a new one had been made, Queen Victoria, to the astonishment and confusion of the constitutionalists, stopped the official in the very act, saying impulsively, "Don't spoil it." "The merest tap was all that was given, and the Queen presented the unspoilt Seal to her Chancellor."—*L.T.*, 1929, p. 342.

Capital Punishment.—On Wednesday in the House of Commons Mr. W. Brown moved: "That, in the opinion of this House, capital punishment for civil crimes should be abolished." He said that so far from capital punishment being a deterrent it had exactly the opposite effect, and that punishment should be remedial and not "punitive," whereas capital punishment beside being "irrevocable" was "punitive to the last degree." Commander Kenworthy, who seconded the resolution, urged that cases of premeditated violence leading to death were in the minority and that the "deterrent argument" had therefore no validity, but another member pointed out that the existing law deterred many burglars and others from carrying arms which might become the instruments of unpremeditated crimes. The Home Secretary said the Government viewed the sentiments which had been expressed during the debate with sympathy. The question had been debated in the House eighteen times during the last hundred years, and no one could rise from a perusal of the record of those debates without some doubt as to whether the abolition of capital punishment for the worst class of

murders could be safely undertaken. Sir H. Samuel moved as an amendment that "it is desirable that a Select Committee should be appointed to consider the question of capital punishment," and in the end this amendment was agreed to without a division. Experience gained in other countries, where, for instance, populations are much less dense, are often misleading, and the same remark applies to facts gleaned from our own social history during times when nothing remotely resembling the dole existed and the poor law was not too well administered, so that hunger and poverty had much more driving force.—*L.T.*, 1929, p. 343.

Dominion Status.—Recent discussion has rendered opportune the appearance of Professor A. Berriedale Keith's vivid book on the *Sovereignty of the British Dominions,* published by Messrs. Macmillan & Co., Ltd. The Report of the Imperial Conference of 1926, variously regarded as a statement of existing fact, a creative declaration of sovereign independence rendering secession otiose, and a pronouncement weakening the Empire as an instrument of world peace, naturally looms large in the volume and explains its aim of considering the growth of the sovereignty of the Dominions, its present extent, and the limitations to which it is subject. With regard to this report two pregnant facts are emphasised—the first, that it has never been approved by any Parliament with the exception of that of the Union of South Africa, and the second, that it has never been communicated to foreign governments as a declaration of the British view. The author, in this volume, deals only with the Dominions technically so styled—Canada, Australia, New Zealand, the Dominion of South Africa, the Irish Free State, and Newfoundland. He is not concerned with Southern Rhodesia and Malta, which possess responsible government but have not yet been accorded Dominion status, and he adds that "India, though a member of the League and assured in due course of Dominion status, has not yet attained it." It will be recalled that the salient words of the declaration were those describing Great Britain and the Dominions as "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations." The author remarks on this statement that, had the committee gone no further, the report might

have been justly criticised as "lacking to a certain extent in reality," but he calls attention to the rider, too often forgotten when summarising the results of the conference, the gist of which was that "the principles of equality and similarity appropriate to status do not usually extend to function," with regard to which "more than immutable dogmas are required."—*L.T.*, 1929, p. 363.

Doubtful Meaning of the Phrase.—Lord Reading in his speech in the House of Lords this week spoke of the words "Dominion Status" as used in the recent pronouncement regarding India, as "conjuring up a position in advance of what might be described as responsible government". Lord Birkenhead said that Dominion Status did not mean at this moment what it meant before the last Imperial Conference, and no one could say whether it would mean in five years' time what it meant to-day. Lord Crewe spoke of it as a "vague expression". It would be absurd to minimise the influence of dogmas and phrases—especially those which are deemed very accurately to fit realities—in influencing actions and discouraging those which are incompatible, but realities come first in order of time. What as a part of the reality of the situation are the attitudes of the various Dominions towards the phrase in question? No imminent dangers overhang Canada and opinion there is in favour of the fullest autonomy. The same remark applies to the Union of South Africa, which has its difficulties within its own borders. History seems to have doomed our nearest Dominion to "ask for more". But Mr. Hughes's words, spoken in 1927, illuminate the attitude of Australia with its Asiatic preoccupations. He said frankly in that year, "I am for the Empire, because I know of no other way of being for Australia." New Zealand would probably echo that pronouncement. The Prime Minister of Newfoundland said quite candidly in the same year that Newfoundland did not wish for a status of equality with the Mother Country as it would be of no value to her. The author says of the report mentioned in the last paragraph that its emphasis is laid not on distinct sovereignty, "but on that unity of interest and aims which is of infinitely more importance than theoretic definition." That expresses our view on the relative importance of the considerations mentioned, yet we feel that definitions and dogmas have in this connection very real importance, and Professor Keith's

book to which we refer the reader, proves how fascinating the attempt to formulate them may be made.—*L.T.*, 1929, p. 363.

Secrecy in Divorce.—When the Judicial Proceedings (Regulation of Reports) Act, 1926, was passed, we, with many of our contemporaries, voiced the opinion that the severe restrictions on publicity imposed by the Act would render resort to the Divorce Court much more common. It will, of course, be remembered that the facts which may be printed or published are, apart from particulars as to the parties and charges, limited to "the summing-up of the judge and the finding of the jury (if any), and the judgment of the court and observations made by the judge in giving judgment." In a recent case the President of the Division, Lord Merrivale, stated shortly the facts in his judgment as he thought it was not in the public interest that social crimes of the kind in question in that case should be committed and the particulars not be made known to the world in which the people lived. Publicity was, he thought, one of the deterrents from misconduct. The Act takes the decision as to publicity from the newspapers and entrusts it to the court, and a glance at the reports of divorce cases before and after the Act was passed will show how the discretion has operated. We do not advocate a return to the old system, but we think that in cases where the parties have exhibited nothing but callous cynicism the course taken by Lord Merrivale should be more often followed. Publicity may deter from immorality or it may deter from proceedings. The fact that it may deter from proceedings in just those cases where reconciliation may seem out of the question is unfortunate, but we suggest that the prevention of acts of especial heinousness is of first importance.—*L.T.*, 1929, p. 365.

The Bench and Politics.—The Lord Chancellor, in the course of his address at the Guildhall last week, made a straightforward statement on the subject of the choice of judges and justices of the peace, saying that in his view politics should not enter into either set of appointments. This is a sentiment which all earnest-minded members of the Profession will emphatically endorse. Not once but several times have we said in these columns that integrity and competence should be the sole considerations in the appointment of justices of the peace, and what is true of the lesser office is equally true of the greater. What are wanted in the occupants of the Bench, be they judges

of the High Court or justices in Petty Sessions, are honesty of purpose and that temperament and cast of mind which have come to be known as "judicial." These are personal qualities and their possessor's politics should be of no account either one way or the other. What importance politics do have is a negative one. To quote the concluding parts of Lord Sankey in this connection: "Violent partisanship does not fit a man for judicial preferment, and is a real hindrance to the cause of justice."—*L.T.*, 1929, p. 387.

Judicial Changes.—The announcement made last Tuesday that His Majesty has been pleased to appoint The Right Hon. Frank Russell one of the Lords Justices of Appeal to be a Lord of Appeal in Ordinary in the place of Lord Carson, can hardly fail to excite universal approbation amongst those who are interested in these matters. It has for some considerable time been felt by not a few members of the legal profession that the Chancery point of view has been somewhat inadequately represented—numerically—in those tribunals to which the ex-Lord Justice has just been elevated; but, coming as it does fairly shortly after Lord Tomlin's appointment, this announcement should satisfactorily remove all criticism on this score for many years to come. The Right Hon. Frank Russell is the fourth son of the late Lord Russell of Killowen, Lord Chief Justice from 1894 to 1900. He was called to the Bar by Lincoln's Inn in 1893 and was elected a Bencher of that Inn in 1913. After a successful career as a Chancery junior he took "silk" in 1908, and was for some time attached to the court of Mr. Justice Astbury, ultimately going "special". In 1919 he was appointed one of the Judges of the Chancery Division and proved to be one of the ablest Chancery Judges in modern times, and it was no surprise to the profession when in 1928 he was raised to the Court of Appeal on the retirement of Sir Charles Sargant.

At the same time the appointment of Sir Mark Lemon Romer to be a Lord Justice of Appeal is announced, thus filling the vacancy created in the Court of Appeal by the appointment of the new Lord of Appeal. This again can in no way be described as unexpected. Mr. Justice Romer was called to the Bar by Lincoln's Inn in 1890, of which Inn he was elected a Bencher in 1910. He took "silk" in 1906, finally becoming one of the leading "specials" of his day. After the death of Mr. Justice Peterson in 1922, Sir Mark was appointed to fill

the vacancy in the Chancery Division so created, and he soon established a reputation as a sound and exceedingly courteous judge. The new Lord Justice is a son of the late Lord Justice Romer, and it is interesting to recall that the last three judicial appointments have all been of men whose fathers in their day held high judicial office.—*S J.*, 1929, p. 753.

Husband Not Without Rights.—Two cases in the Divorce Division, reported *sine nomine* in *The Times* of the 18th ult., re-affirm a proposition in law, which nobody ought ever to have doubted, that a wife's right to maintenance is an incident of cohabitation. If a wife leave her husband for good legal cause she carries her right with her, and ample provision has been made to enforce the right. If she leave for a cause which does not in law justify her in leaving she forfeits her right to maintenance. "Where on the true facts," said the learned president, "the husband is shown to have done his duty to the utmost of his ability, never wilfully to have failed in his duty to discharge his marital obligations, taking them generally as the relations of husband and wife, I find very great difficulty in conceiving a case where a woman can come forward, disclaiming her proper obligations to her husband, and making herself a complainant in law on the ground of her own wrong." In fact a married woman who expects her husband not to neglect to maintain her must not neglect the duties of a wife customary in her state of life. Usually they are to keep house and mother the children of the marriage, but the marriage bargain may be struck on another basis, according to the parties' walk in life, or expressed mutual understanding. It is good to find that the scales of justice are, as we conceive they should be, to be held evenly and not weighted in favour of either sex.—*S.J.*, 1929, p. 754.

The Confiscation of Enemy Private Property.—It is difficult to right ancient wrongs, and though Lord Buckmaster, in the House of Lords on Tuesday, won general assent to his motion as to Ex-Enemy Property, the lapse of fifteen years and the transactions that have taken place in the liquidation of enemy property are said to make it impracticable to wipe out the past, and give to every German citizen in this country the property which by English Law, and on English views of International Law, was secured to him. A German citizen resident here before the war was entitled to the protection of the Crown

for himself and his property. The latter right was violated and the property confiscated on the hollow pretext that the owner could look to Germany for compensation. There was in this neither law nor reason, and the breach of law was not cured by the incorporation of the system in Art. 297 of the Peace Treaty. Under this, the Allied and Associated Powers reserved the right to retain and liquidate ex-enemy property. The hardship inflicted on persons of German nationality in this country was shown by Lord Buckmaster and Lord Parmoor when the former raised the question in the House of Lords on April 6, 1922, and some remedy was given by the appointment of Lord Blanesburgh's Committee, with a limited power of relaxing the practice under the Treaty. It is a matter, as is well known, in which Lord Blanesburgh has taken great interest. The present Government does not, of course, attempt to defend the breach of law involved in the confiscation of German property—robbery, Lord Passfield properly called it —but the confiscated property appears to have got so mixed up in international finance since, that there is difficulty in identifying it, and restoring it to its owners. Still, neither Lord Blanesburgh nor Lord Buckmaster was satisfied with this explanation. Lord Blanesburgh insisted that property still available, which appears to amount to a large sum, should be returned to the owners, and not handed over to the German Government, and Lord Buckmaster's motion for an account of this surplus was agreed to without a division.—*L.J.*, 1929, p. 267.

The Retirement of Lord Carson.—It is announced that Lord Carson has resigned his office of a Law Lord. Following, in 1921, Lord Moulton, who was as brilliant as a judge as a scientist, it may be doubted whether Lord Carson will be remembered for his judicial work, and he made the mistake of carrying his politics into the serener atmosphere in which Law Lords live their contemplative, but eminently useful lives. It was a mistake which sprang from Lord Carson's most cherished convictions, and though the elevation to the House of Lords was, no doubt, genuinely intended to close the stormy incidents of his life, the negotiations for the Irish Free State Agreement brought him into the fray again, and so was raised the question of the liberty of a Law Lord to engage in political strife. It was generally agreed that Lord Carson was wrong, and such a contention is not likely to be revived. But Lord Carson's greatest time was neither in the House of Lords, nor earlier in

the services he rendered, as First Lord of the Admiralty and in other offices, in Mr. Lloyd George's War Cabinet. His reputation is founded on the commanding position which he attained as an advocate at the Irish Bar, and which he transferred undiminished to the English Bar. "I still adhere," Lord Birkenhead has written, "to the opinion that Carson was the greatest advocate the English Bar has produced since Erskine." However that may be, he was for twenty years in the front rank as a leader, but this did not satisfy the aspirations for his own people in Ireland, which sprang from the depths of his nature. That is a side of his career of which it would be out of place for us to speak.—*L.J.*, 1929, p. 283.

The New County Court Judge.—It is not very often that a practising member of the Bar is the plaintiff in an action which becomes a leading case on the branch of the law with which it is concerned; and the fact that Mr. Artemus Jones, K.C., who has just been appointed a County Court Judge in place of the late Judge Roberts, was responsible for getting an important point in the law of libel settled by the House of Lords, adds interest to his appointment. The case, *Jones* v. *E. Hulton & Co.*, (1909, 2 K.B. 444); reported *sub nom. E. Hulton & Co.* v. *Jones* (1910 A.C. 20), is, of course, the authority for the proposition that in an action for libel it is no defence to show that the defendant did not intend to defame the plaintiff, if reasonable people would think the defamatory language to refer to him. The practice of inserting a note at the beginning of works of fiction to the effect that all the characters are purely imaginary, and that no reference is intended to any living person, is a result of this decision. Mr. Artemus Jones, who was called by the Middle Temple in 1901 and took silk in 1919, has had a varied common law practice, particularly on the North Wales Circuit; and last year he was appointed to represent Great Britain on the Anglo-Mexican Commission dealing with claims for damage arising out of revolutionary disturbances in Mexico during the preceding ten years.—*L.J.*, 1929, p. 284.

CONTEMPORARY LEGAL LITERATURE.

With the complexity of business methods and the expansion of trade, the responsibilities of the Banks have increased manifold and it is not infrequently that one finds the Banks made scapegoats of breaches by agents of instructions of their cus-

tomers. The *Law Journal* for August 3rd and 10th has a short note wherein are instanced some cases on both sides of the line, some wherein the Bank was held liable for negligence in the discharge of its duty and some where it was exonerated. In almost all the cases, the good faith of the Banks have been admitted but the question has turned on nice discussions about the information that the Banks must be deemed to have had from the cheques themselves or in the mode of their presentment. The Courts have in all those cases been confronted with the fact that either the customer or the Bank, both of whose hands are clean, are to suffer for the fraud of a third person. As the note points out, "the question in all such cases is whether or not the bankers were negligent in their dealings with cheques of bills of exchange passing through their hands and to avoid liability on the ground of negligence they must show there were not suspicious circumstances which would put them on enquiry." There was recently a case of that kind in the Madras High Court where the agent endorsed as agent cheques in favour of his principal but paid them into his own account with the Bank. It was held that it was sufficient to put the Bank on notice [*see* 57 M.L.J. (sh. n.) 49].

It is familiar to all readers of English Law that equity developed into anything like a definite system very late and even after that in its desire to follow the law as far as it could, several of its rules were by no means clear-cut and definite. It is the rigidity of system in Common Law that necessitated the intervention of "Equity" but even there with Lord Eldon and others reducing equity also to dry rules, it lost much of its flexibility. In the Law of Trespass, the slow progress which equity made is very visible and Professor William F. Walsh of New York University has, in an article entitled "Equitable Relief Against Trespass" in September issue of the *New York Quarterly Review*, shown how the strong desire of equity to leave the law controversies involving the legal title to Law Courts has been responsible for several anomalous rules in this branch of the law. Two suggestions are referred to in the article as to why equity declined to determine a controversy involving the legal title to land "(*i*) that the trial by deposition in equity was not as satisfactory as trial by oral testimony in open Court at law," and (*ii*) the inconvenience of calling suitors from all parts of the country to run up to Westminster, where alone the Chancellor sat. But as the Professor points out, the fact remains that equity

was often called on to determine such questions of fact. The equitable jurisdiction in cases of trespass originally began to prevent powerful defendants acting in defiance of law and molesting the weaker plaintiff but it unconsciously developed and now equity steps in to restrain acts of trespass (*i*) whenever the legal remedy at law is inadequate, or (*ii*) the plaintiff is being deprived of the substance of his estate—there being no dispute as to the plaintiff's title But where the title itself was in dispute, equity generally refused relief until the question of title was decided by a Court of Law. The recognition that mere trespass was also in the nature of waste and needed equity's intervention also came only later and now when the trespass is continuous or repeated continuously so as to ripen into an easement, injunction is issued to avoid multiplicity of suits—and it may be added—also to extend the arm of the law to effectually secure to the owner peaceful enjoyment of the property. Professor Clark's suggestion in his book on "Equity" that the plaintiff need not bring separate actions for each trespass, but may wait and recover for all trespasses up to the time of the trial can, as the learned writer points out, hardly secure adequate relief. The practical advantages of possession, which are not all realised by Courts, is well known and this suggestion is merely encouraging trespasses. The other suggestion to call a policeman to keep the defendant under bonds to keep the peace in a Magistrate's Court is often resorted to and there are provisions in the Criminal Procedure Code (India) to that end. Besides this, there are other cases of trespass in which ejectment will be inadequate and the learned writer refers to cases of an encroaching wall or building, where a mandatory injunction is issued to remove the encroachment.

It is not alone in America that there is a tendency towards higher standards of admission to the Bar. Signs of it are very visible in Madras where the new Bar Council is spending several days for the question of legal education and necessary equipments for the profession A note in the *North Carolina Review*, 1929, p. 287, gives a short summary of the main rules made in Pennsylvania and California. In Pennsylvania any one intending to study law for admission to the Bar must first get himself registered at the beginning of his three years' study. At that time an investigation is made by a Board of local lawyers as to his character, record and reputation. During his three years' course in school or office he is under the super-

vision and guidance of an older lawyer to whom he is assigned. At the end of the course, a more stringent investigation into his character is made and he is to sit for an examination upon legal ethics and traditions. He is also to serve a clerkship of six months at least in a lawyer's office. The Bar in the other State, California, appears to have secured a charter of independence by Legislative Act only recently. The rules of admission. therefore have to take effect only a little later after those who have begun their course on faith of the old regulations have been enrolled and July, 1932, has been fixed for the commencement of the new rules by which two years' academic work followed by a three years' course to a law degree in an approved law school is made the minimum requisite. The student has also to get himself registered and pass a character investigation at the beginning of his period of study of law. These rules largely aim at the character of the member forgetting all the while that it is only later in life when he finds the many thorns in his way in the profession that he tries all means in his power to remove them.

The address of Mr. Litchman delivered at a meeting of the Seattle Alumnæ of Phi Alpha Delta (Seattle, Washington) on *"The Practical Application of Legal Philosophy in Everyday Law Work"* [*American Law Review,* March, April, May, 1929] affords very interesting reading. His purpose in the address is to speak about the "why" of the law and how if an advocate knows the "why" of the law, he can present his case to the Court with better results. It is a truism that "after all, lawyers are paid by their clients, to obtain results" though in theory it may require to be tempered by the Advocate's duty to the Court. He discusses the philosophical theories of law under six heads: (*i*) The logical, (*ii*) the moral, (*iii*) the time-social evolutionary, (*iv*) the environmental, (*v*) the force-sociological. and (*vi*) evolutionary economic. They are being used in everyday work only without its being realised and the advocate who is able to marshal them all together and in apt places succeeds the best.

(*i*) *The Logical Theory*—This is the reasoning by direct example and, if that cannot be done, by analogy. This is the most common method and possibly the one that Courts governed by precedents have to follow The legislature does not reverence this theory at all and it goes on repealing past laws and re-enacting new laws as it thinks best. He thinks that this theory has

the disadvantage that it is merely mechanical and requires the Judge to decide which set of decisions approaches the facts of the case nearest.

(*ii*) *The Moral Philosophical Theory.*—Its greatest exponent is Rudolph Stammler. According to this school, law is announced or enacted to realise that which is for the social good at a given time. Equity Courts adopted this system and softened the harshness of the Common Law. One of its greatest slogans is "public policy." On several occasions when shelter was sought under an old rule of law, the Courts applying this theory of "human kindness" cast it aside and rendered justice to the victim of the old law.

(*iii*) *The Time-social Evolutionary Theory.*—This was recently propounded by Chief Justice Cardozo of New York Court of Appeals. According to him, time is an important element in the administration of law. As time rolls on, new customs come in and legal concepts must also change to accord with them. Social conditions and legal concepts must go hand-in-hand. If an old decision applicable to the case is cited, the exponents of this school will visualise a picture of the condition of society at the time and a picture of the society at the present time and see how far that rule can be followed at the present day.

(*iv*) *The Environmental Theory.*—This is more followed by the Legislature which takes note of the environments of the people for whom the law is to be made.

(*v*) *The Force-sociological Theory.*—This is an analogous theory and tries to make law a social tool and regulate it according to the social position of the litigants. This is also largely applied by Legislature. The social and political warfare between different classes of human society is sought to be regulated, the end in view being the peaceful existence of society as a whole.

(*vi*) *The Evolutionary Economic Theory.*—"Law, to this school, is viewed as a social tool set in motion by the Government . . . . to regulate the conduct of peoples towards each other, primarily in their relations towards property." This takes note of the economic developments in the country and develops law accordingly. As an illustration, the writer instances the *Haverty case*, 134 Wash. 235. There a longshoreman was injured while employed on a vessel by the negligence of the hatch-tender, a fellow employee who failed to signal to him the descent of a load. The question arose if the stevedores were liable or the

hatch-tenders. Several doctrines were called in aid like the fellow-servant doctrine and non-delegable duty doctrine. Respondeat superior doctrine based on individual employment can have no application to cases where, as often happens in modern business, he is the servant of two or more employees. The Court held that the fellow-servant doctrine was of no use hereafter because of the changes in the economic, legislative and judicial world.

BOOK REVIEWS.

LEGAL ETHICS—The Advocacy Series, Vol. VII—by Messrs. P. Ramanatha Aiyar and N. S. Ranganatha Aiyar. Price Rs. 4.

A treatise on professional ethics preaching the highest degree of moral courage, unselfishness and backbone to the lawyer can only fall flat on an extremely discontented bar, which has begun to feel all the disadvantages of overcrowding and the keenest competition among its members. But the sincere hope, that "in a democratically evolving country, canons of professional ethics will tend to raise and to strengthen the standard of professional honour," has perhaps actuated the authors of this volume, the last of the series, to complete their endeavour with an exhortation to the members of a most honourable calling, to respond to all the great qualities of head and heart for which they stand. Highly sarcastic as it may seem if the legal profession were to be characterised as "superior even to war in many respects, even in the primary respect of ruin to both the parties," a close observer of individual vagaries as well as one having intimate knowledge of the intricate workings of the profession, may not completely disagree with the statement, when instances of the base purpose for which litigations sometimes get actually promoted by persons belonging to the profession are within his knowledge. The adoption of a code of Ethics by the members of the American Bar Association and that of San Francisco extracted in this volume amply conveys to us the great importance which such countries have attached to the formulation of a code of ethics for the maintenance of a proper standard in the legal profession. Hence it may not be out of place or untimely for the circulation of a book of this kind which deals with the real benefits that would accrue to the Bar as a whole, by its conforming to such ideals as would guide its members in their great and responsible task of acquitting themselves as men and

citizens. The numerous chapters of this volume, exhaustively dealing with the duties of the advocate towards his clients, his colleagues, and the Bench, have not omitted the attitude which Judges also ought to cultivate towards the Bar, which alone can perfect the system of administration of justice in the land. Though one may be inclined to feel satiated with the too many cuttings and extracts in the volumes of the series, he cannot possibly be indifferent to the untiring energy of the compilers of such information who richly deserve approbation.

We add our word of praise to the good opinion which the volumes of the series have been enjoying already.—*K.C.*

MAXWELL'S INTERPRETATION OF STATUTES, 7th edition, by G. F. L. Bridgeman, 1929. Published by Messrs. Sweet and Maxwell. Price Rs. 22.

Maxwell's Interpretation of Statutes has been looked upon as the leading text-book on the subject and the opinions of its author have been freely quoted by Judges in their judgments. We therefore welcome the present edition of the work which has appeared nearly nine years after the last edition. The excellence of the work is so well known to the bench and the bar that it is unnecessary to dilate upon the plan of the work or its contents. It is, however, necessary to say that the present edition is slightly smaller in size than the previous one as some unnecessary and to some extent irrelevant matter has been deleted. Reference must be made to two new features in the present edition, *viz.*, the giving of the short titles of statutes for convenience of reference and the inclusion of the English Interpretation Act of 1889 on which the Indian General Clauses Acts are to some extent based, as an appendix to the work. Cases which have appeared since the publication of the last edition bearing upon the interpretation of statutes which otherwise are not sometimes easy to get at, have been referred to and noticed by the editor of the present edition in their proper places. We have no doubt that the present edition maintains the high excellence of the previous ones and will be found invaluable both by the bench and the bar.

We have great pleasure in acknowledging the receipt of the All-India Ready Referencer, January to June, 1929, Civil, Criminal and Revenue, which is an exhaustive subject index to all the rulings of all the High Courts and other superior Courts

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NOTES OF INDIAN CASES.

KAPURJI MAGNIRAM *v.* PANAJI DEVICHAND, I.L.R. 53 Bom. 110.

The right of a partner of a firm who enters into a contract in his individual character with a third person for partnership purposes came up for discussion and the question was whether he could sue alone on the contract without joining the other partners as parties to the suit. The learned Judges looked at the matter from several points of view and came to the conclusion that he alone could sue. The answer to the question depends on the correct interpretation of section 230 of the Indian Contract Act which embodies the law for this country. To disentitle the agent from suing the contract must under the section have been entered into by the agent on behalf of the principal. This essential has not been satisfied in the present case, as the agent entered into the contract in his own name though the result of it would have gone to the partnership. The decision of the Privy Council in *Agacio* v. *Forbes*[1] shows that the Act has only adopted the pre-existing English law on the matter. Viewed as a contract on behalf of the principal in which the agent has an interest, even then, the agent could sue on it himself. This was laid down in *Subrahmania Pattar* v. *Narayanan Nayar*[2] though only *obiter* and followed in *Mallhu* v. *Megh Raj*.[3] The right of an agent with an interest in the subject-matter of the contract to sue on the contract has been explained in *Coorla Mills* v. *Vallabhdas*[4] adopting the view of Sir Frederick Pollock and Mr. Mulla in their commentaries to the Indian Contract Act on the ground that to

1 (1861) 14 Moo P.C. 160 2. (1900) I.L.R. 24 M. 130
3. (1920) 55 I.C. 992. 4. (1925) 27 Bom. L.R. 1168 at 1181.

the extent of his interest in the contract the agent himself is a principal and is therefore entitled to sue and the provisions of section 230 do not stand in the way of the principal suing on the contract. In this connection, it may perhaps be asked whether an agent who in this view is only a co-contractee along with the principal who also is interested in the contract can sue alone without impleading his other co-contractees in the suit. *Cf.* section 45 of the Indian Contract Act.

The last and perhaps the most important point considered in the case is the effect of clause (2) of paragraph 2 of section 230 of the Indian Contract Act, *i.e.*, whether to give rise to a presumption of a contract to the contrary within the meaning of the section, it is only sufficient that *the agent* has not disclosed the name of the principal though the other party might otherwise be aware of the existence of a principal on whose behalf the contract has been entered into and the name of that principal. The language of the section certainly lends colour to the view that even if the other party obtains the knowledge of the identity of the principal from other sources, there would be a contract to the contrary and the contract may be enforced by or against the agent personally. This is the view which Fawcett, J., has adopted in the case under notice differing from West, J., in *Mackinnon Mackenzie & Co.* v. *Lang, Moir & Co.*[5] of whom it is probably not right to say that he overlooked the language of cl (2) above referred to, as the discussion by that learned Judge was with reference to that section. His Lordship apparently proceeded on the view that the person to whom credit has been given by the other party to the contract is the person entitled to sue and liable to be sued on the contract and this is the principle underlying section 230 of the Indian Contract Act as pointed by Sir Frederick Pollock and Mulla in their commentaries to the Act. It may also be noticed that the view of West, J., has been followed by the Lahore High Court in *Lyallpur Sugar Company* v. *Mul Raj*[6].

JYOTI PRASAD SINGHA DEO *v.* JOGENDRA RAM RAY, I.L.R. 56 Cal. 188.

This decision is one of some interest on the construction of article 17 of the second schedule to the Court Fees Act. The question that directly arose for decision was whether in an appeal against a decree for costs in a suit for partition of joint

5. (1881) I.L.R. 5 Bom. 584.

6 (1921) 65 I.C. 473.

family properties, Court-fee has to be paid *ad valorem* on the amount of the costs objected to or whether a fixed fee of Rs. 15 has to be paid under article 17 (*vi*) of the second schedule of the Court Fees Act; and the learned Judge has held that as the suit for partition in a joint family is one falling under the latter provision, a memorandum of appeal against the decree in the suit whatever may be the nature of objection taken in the appeal is only liable to a fixed fee under this provision. Though it may be noticed that there is a conflict of opinion as to the provision of the Act under which a plaint or memorandum of appeal in suits for the partition of joint family properties falls, as to which reference may be made to *Rungiah Chetty* v. *Subramania Chetty*,[1] the decision under notice would affect the cases of suits for partition amongst co-tenants other than members of a joint family even in Madras, which according to the Madras High Court would fall under article 17 (*vi*) of the second schedule to the Act. See *Gill* v. *Varadaraghavayya*.[2] This decision would also seem to lead to the conclusion that even with regard to the cases falling under the other clauses of article 17 such as, suits to set aside summary decisions or orders of the Civil Courts not established by the Letters Patent or of the Revenue Courts, suits for mere declaration without consequential relief or suits to set aside an award or an adoption, a memorandum of appeal even though objecting to the decree in the suits with regard to costs alone, which may be a considerable amount is liable to a fixed Court-fee of Rs. 10 or 15 as the case may be and not *ad valorem* on the amount of costs the liability for which is objected to, as in suits for money under section 7. It is not clear whether this result was contemplated by the legislature; but the provisions of the Act lend themselves to the construction adopted by the learned Judge in this case. It is significant that there does not seem to be any direct decision on the question apart from the one under notice, although the enactment has been in force for over half a century.

GAHAR ALI HOWLADAR *v.* ABDUL OWAHAB SHIKDAR, I.L.R. 56 Cal. 192.

It is not strange that there is no prior reported decision on the point that where one of several judgment-debtors pays the whole decree amount into court to the credit of the decree-

1 (1910) 21 M.L.J. 21 (F.B.)
2. (1919) I.L.R. 43 M. 396 · 38 M.L.J. 92.

holder and the court receives it as such, time for a suit for contribution against his co-judgment-debtors runs from the date of such payment and receipt by the court and not only from the date when the decree-holder draws the amount from court. The proposition seems not capable of serious argument to the contrary, as the court in such a case receives the money acting as the agent or *quasi* agent of the decree-holder and the money is afterwards for all practical purposes as though in the pocket of the decree-holder himself. When, however, the learned Judges meet the argument to the contrary, namely, that time runs only from the date of withdrawal of the money by the decree-holder, by observing that if that argument were accepted the judgment-debtor who paid the amount into court would have no cause of action for contribution against his co-judgment-debtors, till after the amount is drawn by the decree-holder, it is not clear whether the observation does not proceed on a fallacy. The existence of the cause of action or its absence does not depend on the Limitation Act which merely limits the time within which an action can be brought, but on substantive law. As was pointed out by the Privy Council in *Hari Nath Chatterjee* v. *Mothurmohun Goswami*,[1] the intention of the law of limitation is not to give a right when there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right. That the third columns of the articles of the Limitation Act do not always mark the time of the accrual of the cause of action has been shown by Srinivasa Aiyangar, J., in *Seeti Kutti* v. *Kunhi Pathumma*.[2] It is therefore possible that there may be a cause of action for a suit for contribution as soon as the amount is paid into court and there is nothing to prevent limitation commencing to run from a later date, *i.e.*, when the decree-holder draws out the amount. As however the expression "date of payment" in the third column need not be restricted to the date of payment into the hands of decree-holder himself, payment into court so as to constitute it payment to the agent or *quasi* agent of the decree-holder vesting the dominion of the money in him, would be sufficient payment within the meaning of the article.

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1. (1893) I.L.R. 21 C. 8 at 18 (P.C.)
2. (1915) I.L.R. 40 M 1040 at 1062 · 33 M.L.J. 320 (F.B)

JUGGI LAL *v.* SWADESHI MILLS COMPANY, I.L.R. 51 All. 182: 56 M.L.J. 282 (P.C.).

There may be deception by sound as well as by sight and an instance of such deception by sight gives rise to the well-known cause of action known as passing-off action by deceptive imitation of another's trademark. The complaint was that the defendant began to use trademarks which though if critically looked at by a person of such literacy as to have critical powers of observation would not be confused, yet would be apt to be confused by the illiterate and unobservant and in particular the imitation was such that a person coming and asking for lotus cloth as the plaintiffs' cloth was known in the market might be satisfied by having cloth delivered with the trademark of defendants. This was held to justify the action by the plaintiffs for damages. The High Court had taken the entire sales of the defendants and attributed a proportion to the trademark and had given profits on that. The Privy Council thought that method of dealing with the matter as too speculative and substituted instead a calculation of profit on the footing of the diminution of the plaintiffs' trade allowing some margin also for expansion.

BANKEY LAL *v.* RAGHUNATH SAHAI, I.L.R. 51 All. 189 (F.B.).

The question in this case was the phantom raised by the Privy Council decision in *Vaithialinga Mudaliar* v. *Srirangath Anni*[1] as to whether even under the Limitation Acts of 1871, 1877 and 1908 suits by reversioners after the death of a Hindu female would not be barred if the stranger was in adverse possession for over 12 years against the female. In other words whether *Runchordas case*[2] is still good law? The majority hold quite rightly that where Art. 141 applies there is no question of adverse possession. Whether possession was adverse against the widow or not, whether she might be barred or not the reversioner would not be barred. That was the view we took of that case when it appeared (*see* 50 M.L J. Short Notes, p. 10) and we are glad to note that the Privy Council has taken that view in *Jaggo Bai* v. *Utsava Lal.*[3] The last case, however, would seem to leave the question open as to the result of a decision against the widow in a suit for possession on the ground of limitation, and a further decision of the Privy Council might be necessary to

1. (1925) L.R. 52 I.A. 322· I.L.R. 48 M. 883· 49 M.L.J. 769 (P.C)
2 (1899) L.R. 26 I.A. 71: I.L.R. 23 B 725 (P C).
3. A.I.R. 1929 P.C. 166

remove the cobwebs of doubt. The true position in that matter would seem to be this: where the suit of the widow is dismissed on a ground of limitation the suit must be taken to be dismissed on a ground peculiar to the widow and such a decision cannot bar the suit by the reversioner. Where, however, the case is one governed by the Limitation Act of 1859—that is to say where the right was extinguished under the old Act and the stranger acquired a right before the Act of 1871 came into force—the case would be wholly different and a decision on those facts against the widow would also bar the reversioner. Such in fact was the case in *Hari Nath Chatterjee* v. *Muthurmohun Goswami.*[4] Slightly different was the case in *Vaithialinga Mudaliar* v. *Srirangath Anni,*[1] but that again was a case to which Art. 141 had no application. Unfortunately, the case under review adopts the unsound distinction that those cases deal with representation in suits, whereas in the particular case the point that arose was one of limitation which is governed by *Runchordas Vandrawandas* v. *Parvati Bhai.*[2]

PRAMATHA NATH DAS BAIRAGI *v.* CHAMPA DASI, I.L.R. 56 Cal. 275.

This decision brings into relief the undesirability of erecting as principles of law the statement of facts in a previous case from which a similar inference was drawn by the learned judges and the consequent abuse of precedents. Though the construction by a tenant of *pucca* structures on the leasehold property may be a piece of evidence—and a strong piece of evidence—for coming to the conclusion that the tenancy was of a permanent character, it cannot be asserted that the putting up of *pucca* structures is a legal prerequisite to create a permanent tenancy. Consequently the learned judges in the present case refused to treat the case of *Abdul Hakim Khan Chowdhury* v. *Elahi Baksha Saha*[5] as laying down the rule that putting up by the tenant of permanent structures is of the essence of permanent tenancy and pointed out the true limits of the decision in the case above referred to, though some of the observations in it were, it must be admitted, somewhat loosely expressed.

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1 (1925) L.R. 52 I.A. 322: I.L.R. 48 M 883: 49 M.L.J. 769 (P.C.).

2 (1899) L.R. 26 I.A. 71: I.L.R. 23 B. 725 (P.C.)

4. (1893) L.R. 20 I.A. 183: I.L.R. 21 C. 8 (P.C.).

5. (1924) I.L.R. 52 C. 43.

SEETHAYYA *v.* SUBRAMANYA SOMAYAJULU, I.L.R. 52 Mad. 453: 56 M.L.J. 730 (P.C.).

In this case, the Privy Council reverse the decision of three Judges of the Madras High Court in *Somayajulu* v. *Seethayya*.[1] The question is one relating to the vexed subject of Estate or no Estate. The grant in the case was a Shrotriyam grant to a Brahmin. The question as it presented itself to the Privy Council was merely a question of construction of the grant. The High Court had proceeded on the rule as to presumption enunciated in *Muthu Goundan* v. *Perumal Iyen*.[2] Their Lordships applying the rule laid down in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*,[3] viz., that there is no presumption either way had to reconsider the question and held differing from the High Court that the grant was not a grant of both the warams, but of revenue only. The considerations that weighed with them were: (*i*) The use of the word Shrotriyam in connection with the revenue (Their Lordships do not accept the contention that Shrotriyam grant is necessarily of revenue only), (*ii*) the use of the word *mouja* which was held to denote occupied village by Sadasiva Aiyar, J., in *Venkata Sastrulu* v. *Sitaramudu*,[4] (*iii*) the fact that the grantors were Deshpandyas or revenue-farmers, (*iv*) the fact that the grantees were non-resident Brahmins. Their Lordships held that the cumulative effect of all these circumstances was to incline them to the view that the grant was only of revenue.

Another point of evidence also arose in the case. In this case, a copy purporting to be a true copy and more than 30 years old was produced. The question was whether it could be used to prove the contents of the original without more. In this case the copy was signed by the then agraharamdars with a statement that it is a true copy. The High Court held that the statement was admissible under S. 32, cl. (7) as a statement by a deceased person relating to a transaction under section 13, clause (*a*). The Privy Council held that it was admissible also as an admission by the respondent's predecessor-in-title. The High Court applied S. 90 of the Evidence Act to presume the genuineness of the copy. The Privy Council affirms this view. This is what their Lordships say on the matter: "The document is over 30 years old and is produced from proper custody. By S. 90 of the

1. (1922) I.L R 46 M. 92 (F B)
2 (1921) I.L R. 44 M 588: 40 M.L.J. 429 (F B)
3 (1922) L.R. 49 I.A. 286· I.L R 45 M. 586 at 588· 43 M.L.J. 640 (P C.).
4. (1914) I.L.R 38 M 891: 26 M L.J. 585.

Evidence Act of 1872 the Court may *presume* therefore the signatures authenticating the copy to be genuine. The statement to which the signatures are appended, *viz.*, that the document is a copy of the original appears to be evidence both for the reason given by the Chief Justice, *viz.*, as a statement relating to a relevant fact and also as an admission made by a party and a predecessor-in-title of the parties." The last is an intelligible ground. The previous seems to be somewhat of a liberal construction of S. 32, cl. (7). The judgment of the Privy Council thus affirms the proposition that S. 90 applies to copies; whether you could go further and presume under the section the genuineness of the original, their Lordships do not expressly say; possibly the judgment involves that—though not absolutely clearly.

PUNJAB COTTON PRESS COMPANY, LTD. *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL, I.L.R. 10 Lah. 161 (P.C.).

The Privy Council have in this judgment reversed the decision of the Lahore High Court reported in *The Punjab Cotton Press Company, Ltd.* v. *The Secretary of State for India*[1] on the ground that there was no finding by them that the action complained of by the plaintiff was taken by the defendants in pursuance of S. 15 of the Northern India Canal and Drainage Act VIII of 1873. The plaintiff's allegation was that the acts of the defendants were done not for preventing any accident to the canal but for the purpose of protecting a railway embankment, in which case the protection given by S. 15 of the Act would not be available to them. The judgment of the High Court however shows that the Court was satisfied on the evidence that the defendants acted in the manner alleged with a view to prevent an accident to the canal and the High Court held in consequence that the action was justified under S. 15. If the act itself was justified by statutory authority on the facts as found by the High Court, then the plaintiff must have been non-suited not merely on the ground that the action was statute-barred under Art. 2 of the Limitation Act but also on the ground that there was no cause of action at all for damages. The judgment of the High Court is however understood by the Privy Council as not containing any definite finding as to whether the operation of cutting the canal bund was for the purpose of preventing an accident to the canal. The Privy Council, however, state that Art. 2 will apply if it is proved on the facts that as a matter of fact the defendants' acts were really for the protection of the canal. This should not be understood as laying down that Art. 2 will be inapplicable if it is merely found that the acts were performed by the Canal Authorities in the honest though mistaken belief that they were authorised under the Statute to take action in the manner in which they acted for the purpose of preventing an accident to the canal. It would not matter if the acts themselves did not really and in fact prevent the accident to the canal. If of course they did, the defendants need not rely on limitation under Art. 2 as a defence as in that case they can plead statutory authority as a justification for their action and the plaintiff's suit would fail on the merits. The distinction pointed out above must be borne in

1. (1923) I.L.R. 4 Lah. 428.

mind notwithstanding the somewhat obscure language of the Privy Council judgment.

KIRPA SINGH *v.* AJAIPAL SINGH, I.L.R. 10 Lah. 165 (F.B.).

This Full Bench decision contains an instructive discussion as to how far the provisions of the Sikh Gurudwara (Punjab) Act VIII of 1925 have retrospective effect so as to affect pending appeals. The rules of interpretation as to the retrospective effect of statutes are no doubt already well established and this decision merely follows them but the value of the decision lies in the discussion relating to the application of the said rules with special reference to the provisions of the particular sections. Where the Court has to decide whether and how far particular sections of an Act part of which is retrospective by express statement or by clear implication, the question becomes instructive in the concrete application of the rules of interpretation stated in general language, to the particular points involved in a specific contention. This decision is one such case and is noteworthy as an instance of retrospective effect being given to particular sections of an act by reason of necessary implication with the qualification that the Court should not give a greater retrospective effect than the language renders necessary. The question of retrospective effect of similar legislation in Madras with reference to the Madras Hindu Religious Endowments Acts I of 1925 and II of 1927 is referred to in *Arunuga Thambiran* v. *Namasivaya Pandara Sannadhi*,[1] where their Lordships observe that "there is nothing in that Act which gives retrospective effect to proceedings already instituted." That decision merely held that a pending suit for settling a scheme does not abate altogether by reason of the passing of the Madras Act I of 1925. It does not follow that in the actual framing of the scheme by the Court the provisions of the Act with reference to the management of the temple can be ignored and that no part of the Act will have any application at all and that the Court is at liberty to ignore the Act altogether. That question will have to be examined with reference to the language of the different sections of the Act and a decision arrived at on a proper construction of the same.

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1 (1925) I.L.R. 48 M. 688: 49 M.L.J. 324.

N. V. N. NATCHIAPPA CHETTIAR *v.* KO THA ZAN, I.L.R. 6 Rang. 488.

Were the matter *res integra,* and merely rested on S. 101 it may possibly be argued that where the continuance of a mortgage is for the purchaser's benefit, no question of intention need arise but even then some difficulty will arise from the comma after the words "unless he declares." If there were a comma after the word "unless," the construction may be right but as it is "unless he declares" qualifies the last clause as well. The learned Judges in the case under notice say that *Gokaldas Purammal's case*[1] dealt with a state of affairs prior to the passing of the T. P. Act but they overlook the later decisions of the Judicial Committee in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*[2] and *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh,*[3] where they put it purely as a question of intention. But on the theory that given the option to choose, every man will choose what is to his interest, a presumption has been raised in favour of an intention to keep alive the mortgage wherever it is for his benefit. In certain cases, the presumption has been pushed to the extent of presuming such an intention even when at the time of the purchase the purchaser was not aware of circumstances necessitating such a continuance, as for instance that there was a later incumbrance in *Mahalakshmiammal* v. *Sriman Madhwa Siddhanta Oonnahini Nidhi,*[4] *Surjiram Marwari* v. *Barhamdeo Persad,*[5] *Subramania Pillai* v. *Palaniappa Mudali,*[6] *Velayuda Reddi* v. *Narasimha Reddi*[7] and *Duraisami Naidu* v. *Panadai Asari.*[8] Srinivasa Aiyangar, J., treats the rule as based on grounds of justice, equity and good conscience and he would hold that a person who acts in *bona fide* ignorance is in greater need of equitable relief. This looks very much like trying to find a reason for the rule. (See *Andi Thevan* v. *Nagayasami Chettiar*[9]). But where to presume it will be inconsistent with the possible mentality of the purchaser at the time of the purchase, the Courts have held the presumption to be rebutted. *Govindasami Thevan* v. *Doraswami Pillai,*[10] *Chidambaram Nadan* v. *Muni Nagendrayyan,*[11] *Tiruvengadam Pillai* v.

1 (1884) L.R. 11 I.A. 126: I.L R. 10 Cal 1035 (P C)
2 (1901) L.R. 29 I.A 9. I L.R. 29 Cal 154: 12 M.L.J. 73 (P.C).
3 (1911) L.R. 39 I.A. 68: I.L.R. 39 Cal 527: 22 M.L.J. 468 (P.C).
4 (1911) I.L R. 35 Mad. 642: 21 M.L J 811.
5. (1905) 2 C.L.J. 288.
6. (1913) 26 M.L.J. 94.
7. (1916) 32 M.L.J. 263.
8 (1928) M.W.N. 592.
9. A.I R. 1928 Mad 703: 55 M L.J. 369.
10. (1910) I.L.R. 34 Mad. 119 20 M.L.J. 380.
11. (1920) 39 M.L.J. 445.

Sabapathi Pillai,[12] *Bai Rewa* v. *Vali Mahomed.*[13] In *Ramasami Mudaliar* v. *Gopalasubba Nayakan,*[14] it has been held that the presumption embodied in S. 101 is an equitable presumption and if the purchaser's conduct has not been above board, the Court is not bound to raise that presumption where the circumstances under which the transaction took place are, if not fraudulent, of a very suspicious character. In *Bai Rewa* v. *Vali Mahomed,*[13] the mortgagee himself purchased the property and there were no mesne incumbrances then. Subsequently the sale was held to be invalid as being sale of trust property and the purchaser sought to use his mortgage as a shield. The Court points out that the only idea of the mortgagee could have been to discharge the mortgage as there was at the time of the mortgage no mesne incumbrance to be protected against. See also *Rajah of Kalahasti* v. *Sree Mahant Prayag Dossjee Varu.*[15] But in *Nasir-uddin* v. *Ahmad Husain,*[16] a subsequent purchaser with notice of a contract to sell in favour of another paid off certain mortgages on the property. It was held that in respect of any money paid by way of such discharge, they are entitled to stand in the shoes of the mortgagees whom they have paid off. The set of cases dealing with the question whether the purchaser in execution of a decree in a suit brought by the first mortgagee on his mortgage without impleading the puisne mortgagee can set up the first mortgagor's right as a shield against the puisne mortgagee turn largely on the effect of the old section 85 of T. P. Act and are not discussed here. See *Sukhi* v. *Ghulam Safdar Khan*[17] and *Venkataramana Reddi* v. *Rangiah Chetti.*[18] The effect of the revival of the first mortgage is a total revival and not partial as was suggested in *Syed Ibrahim Sahib* v. *Arumuga Thayee.*[19] (See *Muthammal* v. *Ramu Pillai,*[20] *Sukhi* v. *Ghulam Safdar Khan,*[17] and *Jnanendra Nath Singh Roy* v. *Shorashi Charan Mitra*[21]).

Section 101 has been held to apply only to a case where a person other than the mortgagor becomes entitled to the property and on the principle that acquisitions by a mortgagor enure to the benefit of a mortgagee, thereby increasing the value of his

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12 (1925) 49 M.L.J. 361
13 (1922) I.L.R. 46 Bom 1009.
14 (1928) M.W.N. 674
15 (1916) 30 M.L.J. 391
16. (1926) 31 C.W.N. 538.
17 (1921) I L.R. 43 All 469 (P.C).
18 (1921) 41 M.L.J. 399
19 (1912) I.L R 38 Mad. 18.
20. (1917) I.L.R. 41 Mad. 513
21. (1922) I.L.R. 49 Cal 626 at p. 632.

security, it has been held in *Emperor* v. *Piari Lal*[22] that even where the mortgagor becomes entitled to the prior mortgage by inheritance, he cannot keep it alive as against his subsequent mortgagee and in *Rajah of Kalahasti* v. *Sree Mahant Prayag Dossjee Varu*,[15] though it was also a case of merger by inheritance, the decision went off on the other ground that at the time of succession, there were no puisne incumbrances.

YAN LIN *v.* MYAT SAN, I.L.R. 6 Rang. 506.

Though in the case of a wrongful attachment of the properties of a party to a suit malice has to be shown, it is now well settled that where the properties of a stranger are wrongfully attached it is *per se* sufficient to sustain a suit for damages. See *Kanaye Pershad Bose* v. *Hur Chand Mahoo*,[23] *Gour Sundaree Debia* v. *Shumboo Chunder Mojoomdar*,[24] *Tilukhdari Singh* v. *Chulhan Mahton*[25] and *Assan Mahomed* v. *Kadersa Rowther*.[26] In certain cases the Courts have gone to the extent of holding that though the person actually making the attachment is a receiver or a third person, the person at whose instance and under whose directions the wrongful attachment takes place is liable for the tort. *Abdul Rahim* v. *Sital Prasad*[27] and *Binda Prasad* v. *Ram Chandar*.[28] But the question in the case under review was about the quantum of damages to be awarded where a person wrongfully attaches a stranger's cattle believing them to belong to the judgment-debtor. Though in certain cases of tort vindictive damages may be awarded by way of punishment, generally damages are assessed on the basis of compensating the person wronged and on that basis only such damages as flow directly from the wrongful acts and as a consequence thereof, have been awarded. In *Beauclerk* v. *Beauclerk*,[29] Bowen, L.J., says "speaking generally as to all wrongful acts whatever arising out of tort or breach of contract, the English law only adopts the principle of *restitutio in integrum*, subject to the qualification or restriction that the damages must not be too remote, that they must be in other words, such damages as flow directly and in the usual course of things from the wrongful act." It is on that ground that damages have been awarded in *Badri Prasad* v.

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15 (1916) 30 M.L.J. 391.
22 (1917) I.L.R 39 All 309.
23. (1870) 14 W.R. 120.
24 (1869) 12 W.R. 328
25 (1889) L R. 16 I A. 152: I.L.R. 17 Cal 131 (P.C.).
26. (1924) I.L.R. 2 Rang 181.
27. (1919) I L.R. 41 All. 658
28. (1921) I.L.R. 43 All. 452
29 (1891) P.D. 191 at 200.

Gopal Bihari Lal[30] and *Bhut Nath* v. *Chandra Benode*,[31] where goods were spoiled in the interim between attachment and return of the goods to the owner. In *Goma Mahad Patil* v. *Gokaldas Khimji and Tapidas Khimji*,[32] the Court awarded even the value of the goods stolen while under custody and that has been followed in *Bishambhar Nath* v. *Gaddah*,[33] without any independent discussion. The Judges in the *Goma Mahad Patil* v. *Gokaldas Khimji and Tapidas Khimji*[32] dissent from *Mt. Sabjan Bibi* v. *Shaikh Sariatullah*[34] where it was held that if cattle distrained die a natural death, then the tort-feasor is not liable for it, as that is not a natural consequence of the attachment. The case under review is *ad idem* with *Mt. Sabjan Bibi* v. *Shaikh Sariatullah*,[34] but the learned Judges prefer to follow *Goma Mahad Patil* v. *Gokaldas Khimji and Tapidas Khimji*[32] and award the value of the dead cattle also as damages. Except on the theory that the trespasser is a kind of insurer of the goods, it is difficult to see how the loss from the death of the cattle can be claimed. It is not a natural consequence of the attachment. The distinction may be that theft is an Accident or may be due to negligence, but death is an Act of God and both the sets of cases may thus be reconciled. But the basis of the *Goma Mahad Patil* v. *Gokaldas Khimji and Tapidas Khimji*[32] is that the trespass renders the defendants liable for the full value of the goods and the subsequent occurrence is no concern of the owner. The case follows *Keene* v. *Dilke*[35] where Baron Alderson states "if the sheriff had not taken the goods, possibly the Gas and Water companies *might never have* seized. If you wrongfully take my goods out of my possession, and they are stolen from you, you are bound to recoup me and recompense me for all the injury *occasioned* by the taking." It seems too much to read into this observation an absolute liability to return the goods *in specie* or pay their full value and the italicised words show that the injury must have been *occasioned* by the taking.

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30 (1919) I.L.R. 41 All. 553 at 558. 31 (1912) 16 C.L.J. 34
32 (1878) I L.R. 3 Bom. 74. 33 (1910) I.L.R. 33 All 306.
34 (1869) 3 Beng L.R 413: 12 W.R. 329.
35. (1849) 4 Ex. 388. 154 E.R. 1263

PALANIYANDI *v.* VELAYUDAM PILLAI, I.L.R. 52 Mad. 6: 55 M.L.J. 579.

The point in this case was as to whether a karnam service inam land enfranchised in the name of the widow and daughter enures for the benefit of the reversioners also. If enfranchisement in the name of the widow does not enure for the benefit of the reversioners, it is difficult to see how the joinder of the daughters can affect the question unless their joinder can be taken to indicate the intention to grant successive woman's estates to them. In the absence of words to that effect, it is difficult to presume such an intention. It is doubtful if such a settlement would be within the scope of the settlement officer's authority.

An attempt was also made in this case to apply the principle of Kannivadi case *Abdul Aziz Khan* v. *Appayasami Naicker*[1] to the sale by the widow and the daughters. As they purported to convey the absolute estate and not any indefinite precise estate the extent of which falls to be determined by the court, their Lordships held that the principle of the *Kannivadi case*[1] could not apply to the case.

RAJA OF RAMNAD *v.* SECRETARY OF STATE FOR INDIA, I.L.R. 52 Mad. 12: 55 M.L.J. 770.

Here a suit was brought for the recovery of money which the plaintiff paid as income-tax on figures returned by himself which wrongly included forest and fishery income which the Full Bench in *Chief Commissioner of Income-tax* v. *Zamindar of Singampatti*[2] has held to be not assessable by reason of the Permanent Settlement Regulation. The correctness of the Full Bench case was impeached by the Government on the basis of the Full Bench decision in Calcutta but their Lordships saw no reason to dissent from the Full Bench view.

The further question was as to whether the amount could be recovered, as the mistake was one of law and not of fact. Section 72 of the Indian Contract Act which governed the case does not say that the mistake should not be one of law. In the matter of contracts S. 21 expressly says that mistake in respect of law in force in British India is not a ground of relief in respect of contracts. As here no question of contract was involved, that section had no relevancy. It is curious that this aspect of

1 (1903) L R 31 I A 1 I.L R 27 M 131 (P C.)
2. (1922) I.L.R. 45 M. 518 (F B).

the case is not considered. The English Law on the subject is discussed but there could not be much doubt under that law that a payment under a mistake of law could not be recovered. While there is no reason to restrict the language of S. 72 by reference to S. 21 there is no reason either to enlarge the connotation of mistake under the law by including mistake of law. Every one is presumed to know the law. Just as coercion has been held not to be limited to coercion as defined in S. 15 of the Contract Act, *Kanhaya Lal* v. *National Bank of India, Ltd.*,[1] but has got to be read in the ordinary sense in which it is understood in law, mistake is to be understood, we think, subject to the ordinary limitations imposed by the Common Law as regards its connotation.

A further question that is considered is as to whether S. 52 of the Income-tax Act would bar a suit in such a case. (The corresponding section now is S. 67.) Their Lordships are of opinion that that section cannot apply to a case where there can be no assessment at all in law—the income being exempt, in other words, to a case where the Income-tax Officer has no jurisdiction at all to levy assessment. Whether the particular case in hand is one falling within that category is doubtful.

THE SECRETARY OF STATE FOR INDIA *v.* TRUSTEES OF SRI KUTTALANATHASWAMI TEMPLE, I.L.R. 52 Mad. 25: 56 M.L.J. 24.

Two questions were involved in the case: first, whether the plaintiffs were the owners of the property in question. Secondly, whether the lands were exempt from assessment. The two questions are distinct. While description of the property as temple poramboke would, we think, strongly support the position that the property was temple property—such a description is hardly of value in determining the question whether the temple is entitled to hold the land free from revenue. The Government may remit revenue in individual cases or in certain classes of cases but presumably it would be only as a matter of grace and can be re-called at any time. But a recognition of land as temple poramboke would be clear recognition of title of the temple to the land for it is not usual for the Government to reserve land for prospective purposes of the temple as in the case of roads and other secular public purposes. This distinction has not been, we think, sufficiently borne in mind in the case under review.

1. (1913) L.R. 40 I.A. 56. I.L.R. 40 C. 598: 25 M.L.J. 104 (P.C.).

MORARJI *v.* ADMINISTRATOR-GENERAL, I.L.R. 52 Mad. 160: 55 M.L.J. 478.

"Hindus are born not made" is one of the current fallacies and has been rightly treated as such we think in this case.

Whether a person can be made a Brahmin, Kshatriya or a Vaisya may be a question of some difficulty, but, as according to the theory of Manu, Mlechchas are persons who have fallen from their high estate by not performing the Upanayana ceremony and as such becoming Vratyas, it may not be impossible even according to strict theory to make a Brahmin by undergoing the necessary prayaschitta.

But under the law as recognised by the Courts, usage being paramount, if for years, a certain class has followed the custom of Brahmins and has styled itself as such, there is no reason why Brahmin customs should not apply to such class, in other words there is no reason why such class should not be regarded as Brahmins.

But so far as persons becoming Hindus is concerned, it is a matter of common knowledge and the law has recognised it that whole communities are being Hinduised (*Fanindra Deb Raikat* v. *Rajeswar Das*,[1] *Ram Das* v. *Chandra Dassia*,[2] *Santala Bewa* v. *Badaswari Dasi*[3] and *Ram Pergash Singh* v. *Mussammat Dahan Bibi*[4]). Similarly, there is no reason why non-Hindu individuals should not become Hindus by the adoption of Hindu customs and Hindu beliefs. Just as there is a point at which deviation from Hindu customs will make a man non-Hindu, (*Ma Yait* v. *Maung Chit Maung*[5]) there is a point at which a non-Hindu can well be recognised a Hindu by his change of his beliefs and practices In *Sher Bahadur* v. *Ganga Bakhsh Singh*[6] we have an instance of the child of a Mahomedan woman brought up as a Hindu and Kshatriya and so treated. *Muthuswami Mudaliar* v. *Masilamani*[7] is also a case where conversion to Hinduism is recognised but it may be said that it was by virtue of caste usage that the validity was recognised. Arya samajists recognise conversion to their fold and though it may be that the

1 (1885) I L R 11 C 463 (P C).
2 (1892) I.L R. 20 C. 409
3. (1923) I L.R. 50 C 727.
4 (1923) I L.R. 3 Pat 152 at 176
5 (1921) L R 48 I A. 553: I L R 49 C 310 at 322 42 M L J 193 (P.C)
6 (1913) L R. 41 I.A. 1 I.L.R. 36 A 101 · 26 M.L.J. 291 (P.C).
7 (1909) I L.R 33 M. 342: 20 M.L.J. 49.

question whether a particular individual has become a member of a particular religious community might depend on the recognition by that community of such conversion, no question of recognition of conversion by the Hindu community need complicate the situation when the conversion is to Hindu community for that body is indeterminate with no voice or machinery of its own and having regard to the fact that the recognised injunction of the Smritis is to apply the Smritis to others so far as may be, subject to their usages when they have such—and in cases like the present where the convert has no usages—only excluding such rules as are special in their character and applicable only to special classes like Brahmins.

We think that Mr. Justice Venkatasubba Rao has given the correct lead on the subject and there is no reason why either according to strict legal theory or according to the view of Courts, a conversion should not take place so as to attract the consequence of making the Hindu Law applicable to such converts.

EMPEROR *v.* HIRU SATWA, I.L.R. 53 Bom. 184.

This is an interesting decision. The learned Judges have in effect held that when a piece of land is built on, the owner of the house is not bound to give information to the nearest Magistrate of the occurrence of any sudden or unnatural death on the premises under section 45 of the Criminal Procedure Code, though if it had remained as a vacant land, such an occurrence should have been reported and reliance has been placed on *Queen-Empress* v. *Achutha*[1] for this view. It must be admitted that this decision fully supports the view taken by the learned Judges. There seems, however, to be no distinction in principle, as between owners or occupiers of lands and houses in the matter of reporting about serious crimes to the proper authorities for investigation. The distinction suggested by one of the learned Judges that a house will be in a populous place while a piece of vacant land may not be and that therefore in the case of the former, the investigating authorities may come to know of the occurrence otherwise, seems, with all respect, unacceptable. The reference to the obligation of Zamindars and owners of proprietary estates in *Queen-Empress* v. *Achutha*,[1] under the old Madras Regulation (section 15 of Regulation XXV of 1802) does not seem to be in point, as the provisions of section 45 of the Criminal Procedure Code are clearly wider in many respects and the learned Judges have not referred to any decision which has considered the question whether owners of proprietary estates are under an obligation to report about such occurrences in houses within their Zamindari limits.

Coming to the interpretation of the word "land" used in the section it has been held from the earliest times that in the absence of anything in the context contradistinguishing it from a "house", it includes houses in its signification in deeds and wills. (See *Ewer* v. *Hayden*[2] and *In re Portal and Lamb*[3]). There is also section 3 in this English Interpretation Act, 1889, which enacts the pre-existing law that the word "land" includes houses on it. This rule has been followed in the case of Indian enactments and it was held in *Narayanamma* v. *Kamakshamma*[4] that unless there is anything in the context to limit it, the word "land" would take in houses also. All the authorities will be found collected by Fawcett, J., in *Hoosein Abdul Rehman & Co.*

1. (1888) I.L.R. 12 Mad. 92.
2. Cro. Eliz. 476, 658: 78 E.R. 727.
3. (1885) 30 Ch.D. 50.
4. (1896) I.L.R. 20 Mad. 21.

v. *Lakhmichand.*[1] The decisions in *Dayachand Nemchand* v. *Hemchand Dharamchand*[2] and *Durga Singh* v. *Bisheshar Dayal,*[3] where, with reference to the Court Fees Act, it was held that the word "land" would not include "houses" by reason of both the words being used in juxta-position in the enactment only emphasise the conclusion that by itself the word "land" is wide enough to include houses on it. Thus on principle and authority we venture to think the word "land" in section 45 of the Criminal Procedure Code may well be held to include houses on it and owners of houses may therefore be under an obligation to report occurrences of grave crimes in their houses to the proper authorities.

SURENDRA NATH CHATTERJI *v.* JAHNAVI CHARAN MUKHERJI, I.L.R. 56 Cal. 390.

This decision emphasises that there are no different degrees of proof for the different classes of cases under the Indian Law, the question whether anything is proved, disproved or not proved depending in all cases on the provisions of section 3 of the Indian Evidence Act. The learned Judges in this case have relied on the observations in *Jarat Kumari Dassi* v. *Bissessur Dutt,*[4] that in this country there is only one test or proof with regard to all civil cases. Stated in these terms, it is open to the suggestion that the standard of proof in criminal cases may be different from that in civil cases. Indeed there is some basis for this suggestion in the observations of Jenkins, C.J., in *Jarat Kumari Dassi* v. *Bissessur Dutt,*[4] where reliance was placed on some English cases for the proposition that the standard of proof in criminal cases is different, though there is hardly any warrant for it in the Evidence Act. (See also *Muni Reddi* v. *Venkata Row*[5]). The question came up again before the Calcutta High Court afterwards in *Weston and others* v. *Peary Mohan Dass,*[6] where Woodroffe and Cox, JJ., held that the standard of proof in civil and criminal cases is the same in view of the language of the enactment which is applicable to all cases and that the English cases if they lay down anything different are inapplicable here. This view was followed in *Moti Lal Ghose and others, In re.*[7] The learned Judges in the case under notice only re-affirm the rule in the case of wills.

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1. (1924) I.L.R. 49 Bom. 40 at p. 55. 2. (1880) I.L.R. 4 Bom. 515
3. (1898) I.L.R. 24 All. 218 4. (1911) I.L.R. 39 Cal. 245.
5. (1912) I.L.R. 37 Mad. 238 at p. 244: 23 M.L.J. 447.
6. (1912) I.L.R. 40 Cal. 898.
7. (1917) I.L.R. 45 Cal. 169 at p. 200.

TAHER SHEIK CHOWKIDAR *v.* OTARUDDI HOWLADAR, I.L.R. 56 Cal. 412.

The question whether the appellate court has power under Order XLI, Rule 17 of the Civil Procedure Code to go into the merits of the appeal has frequently come up before the Courts though not under circumstances similar to those in the present case. In the other reported cases, it has happened that the appellate court while dismissing the appeal when the appellant or his pleader did not appear, has expressed its opinion agreeing on the merits with the decision of the lower court; but in the present case, the appellate court allowed the memorandum of cross-objections though no one appeared in support of the same and thus reversed the decision of the lower court. Whether the result is one allowing or dismissing the appeal, the question is always the same where the appellate court has power under the Code to go into and decide on the merits of the appeal in cases where the appellant or his pleader does not appear at the hearing. Though a single Judge of the Patna High Court in *Dulat Singh* v. *Srinivas Prasad Singh*[1] has taken the view that by reason of the change of the language in Order XLI, Rule 17 from what it was under section 556 of the Code of 1882, the appellate court has power to go into and decide the appeal on the merits, the weight of authority is to the contrary effect. (*Muhammad* v. *Manavikrama*,[2] *Nasir Khan* v. *Itwari*,[3] *Basudev* v. *Bideshi*[4] and *Maung Than Ge* v. *Maung Po Thin*.[5]) The learned Judges in the case under notice have come to the same conclusion, though they have not referred to any of these cases in their judgment. The difficulties that would result if a different view is taken are emphasised in *Muhammad* v. *Manavikrama*.[2] It may also be mentioned in this connection that even in cases of non-appearance of parties on an adjourned date of suits, it has been held that the Court has no power to go into the merits of the suit and pass a decree, though the terms of Order XVII, Rule 2 are not identical with those of Order XLI, Rule 17. (See *Phul Kuar* v. *Hashmatullah Khan*.[6]) It may however be doubted whether the High Court in the case under notice should not have remanded the memorandum of objections to the lower appellate court for decision in the light of their observations as was done in *Muhammad* v. *Manavikrama*,[2] rather than dismissing the same, as, in that event, the lower ap-

1 (1920) 57 I.C. 75 2. (1922) I.L.R. 45 Mad. 882: 43 M.L.J. 317.
3 (1923) I.L R. 45 All. 669. 4. (1928) I.L.R. 6 Rang 612.
5. A.I.R. 1925 Rang. 96. 6. (1915) I.L.R. 37 All. 460.

pellate court will have the opportunity to consider whether under the circumstances of the case, it should be dismissed at once or its consideration should be adjourned under Order XLI, Rule 17.

NYAUNGLEBIN CO-OPERATIVE BANK *v.* MAUNG BA U AND OTHERS, I.L.R. 6 Rang. 417.

Though at one time there was a conflict of authority in Madras and Allahabad as to whether a mortgagee who purchases the equity of redemption in a portion of the mortgaged properties does not thereby discharge the mortgage to the extent of the difference between the amount of his purchase and the value of the property purchased, it is now settled that his purchase stands on the same footing with a stranger's purchase and it discharges only such portion of the mortgage debt as bears the same ratio to the mortgage amount as the value of those items bears to the value of all the mortgaged properties. But the question in the case under notice was as to the date with reference to which the values of the properties are to be calculated for the purposes of the rule. Except the case in *Fakiraya* v. *Gadigaya*,[1] all the cases in India are agreed that the material date is the date of the mortgage and not the dates of the purchases of the equities of redemption in the respective properties (see *Gobind* v. *Kailash*,[2] *Sankar Lal* v. *Latafat Ali*,[3] *Bhagwan Singh* v. *Mazhar Ali Khan*[4] and *Meghraj* v. *Krishna Chandra Bhattacharji*[5]). Mr. Ghosh in his "Mortgages" extracts a passage from Jones to point out that in America the authorities are conflicting though the preponderance of authority is in favour of this view. In the case under review the question is left open on the ground that as at the time of the mortgage there was an unfinished house, the parties must have intended that the completed house was to be mortgaged. If the price of the house had varied at three different periods, namely, the date of mortgage, the date of completion of the house and the date of purchase, which is the period to be fixed for computation of values? Can the mortgagee enforce the completion of the building and, if he cannot, can a purchaser of the other properties contend that the value of this property must be calculated on the basis that it was completed when in fact it is not? These anomalies will arise by treating the question as one of intention of the parties.

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1 (1901) I.L.R. 26 Bom. 88.
2. (1916) 25 C.L.J. 354.
3. (1916) 14 A.L.J. 713.
4. (1914) I.L.R. 36 A. 272.
5. (1923) I.L.R. 46 A. 286.

U. E. MAUNG *v.* P. A. R. P. CHETTIAR FIRM, I.L.R. 6 Rang. 494.

In Letters of Administration proceedings between A and B, the High Court granted letters to A, and B took the matter up to the Privy Council for decision. In the meantime after the grant, a creditor of the estate brought a suit against the estate represented by A on a pro-note executed by the deceased. As observed in *Bai Meherbai* v. *Maganchand Motiji*[1] the aggregate of legal rights and obligations were vested in him as the legal representative of the estate and a decree obtained against him will bind his successor as long as that decree was not the result of fraud or collusion. While this suit was pending B applied to the High Court for the appointment of a receiver alleging, among other things, that the suit was likely to be decreed, *ex parte,* but before the actual appointment of a receiver, the suit was decreed *ex parte*. The receiver then filed this application to re-open the proceedings and continue them with him as defendant. Even as an application for setting aside the *ex parte* decree, it was barred.

Their Lordships refer to *Neelaveni* v. *Narayana Reddi*[2] and *Ajodhya Mahton* v. *Mussammat Phul Kuer,*[3] where it has been held that a Court has no power apart from the provisions of O. 9, R. 13, C.P.C., to set aside an *ex parte* decree passed by itself, but distinguish them on the ground that they are all cases where a party to the original suit attempted to have the decree set aside. Again earlier the decision says that an *ex parte* decree is not a deliberate decision of the Court. It is difficult to see how else it operates as *res judicata.* The theory is that the Court decides on the materials furnished by the plaintiff in the absence of materials *contra.* The other ground that the receiver is not a party requires some elaboration. Firstly, if he is not a party or does not seek to be a representative of the party (namely, the estate) the decree will not bind him and will be a nullity. Secondly, the receiver comes in not as a stranger, but as a representative of the estate which was already represented. The fallacy lies in assuming that the suit was against A. The analogy is more that of a minor being represented by a guardian and another guardian coming on the scene later. Can it for a moment be contended that on the ground of mere negligence of the prior guardian the subse-

1. (1904) I.L.R. 29 Bom 96.
2 (1919) I.L.R. 43 Mad. 94· 37 M.L J. 599 (F.B.).
3 (1922) I.L.R. 1 Pat. 277.

quent guardian can apply long after the period of limitation? Suppose also that a decree is passed *ex parte* against a widow. Can a reversioner apply to set it aside on the ground that the widow did not look after the interests of the estate? If the decision should have gone on the footing that apart from O. 9, R. 13, the Court has an inherent power to set an *ex parte* order aside, or that the Court has an inherent power to prevent abuse of its proceedings in which case it will be necessary to prove that the plaintiff was a party to the fraud, it will be intelligible. From the discussion about the "hardship to the original plaintiff" it looks as though no collusion was pleaded. If the administrator A had nominally contested what would be the position? Even in England where the Court has wider powers than under O. 9, R. 13, it would appear that if an improper judgment has been made against an estate without fraud or collusion, it has to be impeached by an original action. *See* Daniel's *Chancery Practice*, p. 1291 (7th edition).

U PO HNYIN *v.* THE OFFICIAL ASSIGNEE, I.L.R. 6 Rang. 689.

Apart from technical reasoning the decision in this case seems to be eminently satisfactory. When an attempt however is made to extract the underlying principle difficulty is encountered. The godown of the commission agent was burnt and he subsequently became insolvent. The goods in the godown were covered by a fire insurance policy taken up by the agent and the question arose whether the owner of the goods could claim the money paid by the insurer to the Official Assignee. In giving the owner the benefit of the equitable doctrine of tracing, their Lordships in effect extended the rule beyond the limits hitherto recognised. Incidentally it may be mentioned that the position taken up by the Trial Judge (see *In the matter of Syed Kasim, Deceased, Insolvent*[1]), that if goods be converted into money their value cannot thereafter be traced, a view long discredited in England and wholly unarguable after *Sinclair* v. *Brougham*[2] was rightly rejected. But the Court of Appeal erred in transgressing the upper limit of the doctrine. The goods had perished and what was left for the insolvent was a mere personal claim for indemnity. It is obvious from the nature of such a contract that the owner cannot maintain any claim as against the

1 (1927) I.L.R. 5 Rang 73
2. 1914 A.C. 398.

insurer. Some reliance seems to have been placed on the circumstance that the insurance premiums were paid by the owner. But it is well settled that such payment will at the best give him a lien for the moneys paid by him and nothing more. (See *In re Leslie*: *Leslie* v. *French*[3].)

If the value of the goods cannot be traced into the hands of the insurer, the question arises whether the payment of the amount to the Official Assignee will make any difference. It may not be correct to describe the insurance money as the *fruits* or the *proceeds* of the goods although it was paid under a contract in relation thereto. More accurately it may be described as a substitute for the property destroyed. Supposing in the case under discussion the agent had utilised the goods for his own purposes and had subsequently stocked other similar goods belonging to himself, can it be said that the new stock got automatically impressed with the trust? It is submitted that in the absence of an intention to make good the loss to the trust estate, the right of the owner is merely to bring an action for conversion or to waive the tort and recover the value of the goods as money had and received. (See in this connection *James Roscoe (Bolton), Ltd.* v. *Winder*[4] and article on "*The Limits of the Doctrine of Tracing*[5]"). Take again a somewhat similar case: after the goods had been destroyed, a sum of money is paid to the agent by voluntary subscriptions or by a relief fund. Can it be said that the owner may follow the value of the goods into those assets? The farthest limit at which the doctrine of tracing can be applied had been reached when the goods were destroyed and anything substituted by way of goods or money cannot be treated as trust property in the absence of a proved intention to that effect.

The judgment apparently proceeds upon a common fallacy, namely, that in such cases it is the goods that are insured. But it is now well settled that such a policy is a personal contract with the insured and that it is the *person* and not the *thing* that is insured. As Lord Hardwicke pointed out in *Sadlers' Co.* v. *Badcock*,[6] "It cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage." The case under review is really governed by the rule of Insurance Law which says that if

3. (1883) 23 Ch. D. 552.
4. (1915) 1 Ch 62.
5. (1927) 53 M.L.J. 133 (Journal) at pp. 139, 140.
6. (1743) 2 Atk. 554 at 556: 26 E.R. 733.

a person having an insurable interest such as a carrier, factor or commission agent recovers the full value of the goods from the insurer he will, after satisfying his own claim, hold the balance in trust for the owners. (*See* Porter's *Laws of Insurance,* pp. 59 and 64. *See also* observations of Bowen, L.J., in *Castellain* v. *Preston*[7]). And it is familiar law that the trustee in bankruptcy is bound by all the equities which affect the bankrupt. (See *In re Condon: Ex parte James*[8] per James, L.J.). The effect of applying the rule to the above case will be that the owner can recover the insurance amount from the Official Assignee less the sums due to the agent by way of commission, etc. The result might vary but in a slight degree from that which their Lordships arrived at, but the objection is to the extension of the doctrine of tracing.

A further question may arise as to what should happen if the insurance money payable by the Official Assignee to the owner of the goods does not cover his entire loss. Thus the policy taken up might be for a lesser amount than the real value of the goods. If it is correct to say that the farthest limit up to which the doctrine of tracing can be applied had been reached when the goods were destroyed, it follows that the relationship of debtor and creditor is constituted and the owner can prove in insolvency. Equity confers a higher right on the owner by means of the rule of insurance law mentioned above but it does in no way derogate from his rights under the general law. Consequently the owner of the goods may rank as an ordinary creditor as regards the loss not covered by payment of the insurance money.

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7 (1882) 11 Q.B.D. 380 at 398.
8. (1874) 9 Ch. App. Cas. 609 at 613

FAQIR SINGH *v.* THE CROWN, I L R. 10 Lah. 223.

This judgment rightly condemns the action of the Magistrate in the case who examined the accused at great length under section 342, Criminal Procedure Code and put as many as 79 questions to him and thereafter allowed the prosecution to adduce additional evidence to rebut the defence disclosed in the course of such examination. The so-called examination which was really in the nature of an inquisition and a cross-examination is not warranted by the terms of section 342. The case was rightly transferred from the file of the Magistrate as in the circumstances the accused had certainly a reasonable apprehension in his mind that he could not get a fair trial.

THE CROWN *v.* SHIB CHARAN, I.L.R. 10 Lah. 253.

The conviction of the accused in this case under sections 511 and 420, I.P.C., is clearly right. The contention that the facts proved amounted only to a preparation to commit an offence is obviously untenable. The definition of the term "attempt" in the Penal Code and the illustration to the section clearly show that the word is used in a wider sense than in the English Criminal Law. The Indian law takes in not only cases where the penultimate act towards completion of the offence has been done, but also cases where some precedent acts are done in the course of an attempt to commit the offence with the intent to commit the offence and towards its commission. In this view there can be no doubt that the offence of an attempt to cheat is established as soon as the accused is shown to have fraudulently applied to the currency office for payment to him of the amount of the currency notes. It would have been a mere preparation to commit an offence, if he had merely stopped with the first letter to the currency office asking for information as to the procedure to be adopted for recovery of the amount of the notes which he falsely alleged to have lost. It may be noted that the argument that there could be no attempt to cheat a person who had already been forewarned of the contemplated fraud and could not be cheated in fact was very properly rejected. There is also ancient authority for this obvious conclusion. See *Rex* v. *Hunter*.[1]

1. 11 Cox, C.C. 570.

MANGOBINDA SADHU *v.* MAHARAJA KUMAR SATYA NIRANJAN CHAKRAVERTY, I.L.R. 8 Pat. 190.

It is now well established that rules of English law as to real property in England can afford no guidance as to what has passed under an Indian grant. See *Rajah of Pittapur* v. *Secretary of State for India*.[1] This was laid down with special reference to the question whether mineral rights pass to the grantee in the absence of a special reservation about them in the grant. The Privy Council have repeatedly held that "even when a grant is made by a Zemindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect." See *Sashi Bhushan Misra* v. *Jyoti Prasad Singh Deo*.[2] In all cases the conclusion must depend ultimately upon the true construction of the particular grant as made out by the language of the instrument and the circumstances of the case. See *Secretary of State for India* v. *Srinivasa Chariar*.[3] The same principle applies even where the tenure is rent free. See *Raghunath Roy Marwari* v. *Durga Prasad Singh*.[4] Where however the original grant is not forthcoming the question must turn upon the evidence of inclusion of the mineral rights in the grant itself. This does not mean that such a case cannot be established otherwise than by express evidence. The series of cases of the Privy Council culminating in *Girdhari Singh* v. *Megh Lal Pandey*[5] establish, that the mere facts of the lease or tenure being permanent, heritable and transferable do not necessarily carry with it the result that mineral rights also pass to the lessee or tenure-holder. See *Satya Niranjan Chakravarti* v. *Ram Lal Kaviraj and others*.[6] The true nature of the particular tenure in question may be such that the tenure-holder may have the mineral rights also, as in the ordinary case of proprietors of the soil. Just as Zemindars under the permanent settlement regulations are regarded as proprietors and in consequence entitled to the mineral rights as well, it may that having regard to the origin and scope and the revenue history relating to sub-infeudation of land, some of the subordinate tenure-holders have all the rights of the proprietors in the soil subject only to the duty of paying the agreed

1. (1929) 57 M.L.J. 64 (P.C).
2. (1916) L.R. 44 I.A. 46: I.L.R. 44 Cal 585: 32 M.L.J. 245 (P.C).
3. (1920) L.R. 48 I.A. 56: I.L.R. 44 Mad 421: 40 M.L.J. 262 (P.C).
4. (1919) L.R. 46 I.A. 158: I.L.R. 47 Cal 95: 36 M.L.J. 660 (P.C).
5. (1917) L.R. 44 I.A. 246: I.L.R. 45 Cal 87: 33 M.L.J. 687 (P.C.)
6. (1924) L.R. 52 I.A. 109: I.L.R. 4 Pat. 244: 48 M.L.J. 328 (P.C.).

rent which may be enforced also by a sale of the holding. The concrete question with reference to patni tenures of Bengal has been elaborately discussed in the decision under notice which takes the view that in this respect the patni *tenure* stands on the same footing as a mukarrari *lease* and hence does not carry with it the right to minerals in the absence of express words of grant. The Calcutta High Court had come to a contrary conclusion. See *Surendra Narain Sinha* v. *Bijoy Singh Doodhoria*.[7] According to the view of Das, J., in this case, the patnidar is purely a lease-holder and is not a proprietor of the soil and the creation of a patni tenure is not an alienation of zemindari tenure. S. 11 of the Patni Regulation (VIII of 1819) is explained by the learned Judge as a loose phraseology for the more accurate description in later legislations to the effect that the rent shall be the first charge on the tenure. No doubt the word "merely" is not found in S. 11 but the general meaning of the language used seems to indicate that the Zemindar's rights in the patni tenure are confined only to the rent reserved. If this be the correct interpretation, then it would go a long way towards establishing that a patni tenure is not a mere permanent lease but is analogous to the creation of a subordinate zemindari interest in the properties conveyed with full proprietary rights in the soil including the sub-soil rights as well. It is not necessary to discuss the matter further as the Privy Council may be deciding the question on appeal from the above decision. It may, however, be pointed out that apart from this general discussion, the particular grant in the case recites that the grantee shall be in possession of all zemindari rights and interests in the lands granted. These words no doubt can operate only upon the actual subject-matter of the grant and do not increase its corpus. The decision of the Privy Council in *Raj Kumar Thakur Girdhari Singh* v. *Megh Lal Pandey*[5] may be distinguished as it was the case of a lease and further the words used are only "with all rights." Further the clause specially permitting the grantee to cut and sell the trees which was found in that document showed that the lease was of the surface only with a superadded right to the trees.

JOTI PRASAD *v.* SRI CHAND, I.L.R. 51 All. 237 (F.B.).

Two important questions arose in this case, *viz.*, first, as to whether it is open to a decree-holder to rely upon a payment not

5 (1917) L.R. 44 I.A. 246: I.L.R. 45 Cal. 87. 33 M.L.J. 687 (P.C.).
7. (1925) I.L.R. 52 Cal. 655.

certified to the Court before the execution of the decree would otherwise be barred with the subsidiary questions whether the certifying should be by a separate application, whether it could be done after the execution petition, and whether Art. 181 would apply to such certifying; secondly, where there is an instalment decree payable on named dates with a clause that in default of two successive payments, the whole should be payable, whether limitation should run from the date of each default, the first default or the latest default. On the first question, they hold that certifying may be done at any time—that it is not a right but a duty and as such Art. 181 is not applicable to it—that it may be done before, as well as after the execution petition. This matter is substantially governed by the judgment of the Privy Council in *Raja Shri Prakash Singh* v. *The Allahabad Bank, Ltd.*,[1] which is to the same effect.

The second question is one over which there is considerable conflict—cases making distinction between decrees giving an option and those not giving an option, some recognising the right to waive and some not, the conflict not being confined to decrees alone but extending to Art. 132. Their Lordships get over the difficulty by saying that claims in respect of instalments payable on specified dates are governed by Art. 182, clause (7) so that if they are beyond that period they would be barred, but that if the claim is for the whole amount under the default clause, Article 181 would apply and limitation would run from the latter of any two successive defaults, applying apparently *Maung Sin* v. *Ma Tok*[2] which, as a matter of construction, held a default clause entitling the decree-holder to possession applied to each default and the decree-holder by accepting an earlier instalment after default was not precluded from availing himself of a later default.

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1 (1928) 56 M.L J. 233 (P.C).
2. (1927) I.L.R. 5 Rang. 422.

RAJA UDIT NARAYAN SINGH *v.* MUBARAK ALI, I.L.R. 51 All. 359: 57 M.L.J. 13 (P.C.).

The question in this case was as to whether the order of the Board of Revenue on appeal confirming the order of the Collector and Assistant Collector making an entry in the Revenue Register was appealable to the Privy Council. Their Lordships hold that it is not. Unlike another section of the Act which made the provisions of the Civil Procedure applicable to the determination of another kind of dispute, the section relating to this matter did not make the Civil Procedure applicable apparently because "all that the Collector could do besides amending the register after the summary inquiry under the section was to put the successful party into possession and his order would not debar the unsuccessful party from asserting his rights by suit in a Civil Court." Even in cases where the Civil Procedure Code is made applicable, whether such provision would attract the consequence of giving a right of appeal to the Privy Council their Lordships do not decide.

SKINNER *v.* NAUNIHAL SINGH, I.L.R. 51 All. 367 (P.C.).

This is a rather important case and would seem to decide that when there is a conflict between Art. 134 and Art. 140, the latter is to prevail. The facts were these: One Thomas Skinner was the original owner of the property. He mortgaged the property to one *X* on simple mortgage with a clause that the latter should be entitled to possession, on default in payment of interest. In 1864 Skinner died leaving a will which as finally construed by the Privy Council conferred only a life-interest on Thomas Brown Skinner, his son. The latter however believed he was the absolute proprietor and gave a mortgage with possession in renewal of the earlier mortgage. Their Lordships decided in *Skinner* v. *Naunihal Singh*[1] that this mortgage conveyed to the mortgagee the right under the earlier mortgage In 1872, in execution of certain money decrees, the mortgagee purchased the equity of redemption. He in his turn purporting to be the absolute owner mortgaged the property to *Y* and subsequently in 1903 the property was sold to *Y*. The life-estate holder Thomas Brown Skinner died in 1919 and the plaintiff as the remainderman sued to redeem the mortgage of 1863. The first Court held that Art. 140 governed the case and the suit brought in 1922 was not barred by limitation. On appeal, the High Court took the extraordinary step of deciding the case

1. (1913) L.R. 40 I.A. 105: I.L.R. 35 A. 211: 25 M.L.J. 111 (P.C).

under Art. 134 though the mortgage-deed and the subsequent sale-deeds were not before it on the ground that the facts admitted of no dispute, against the protest of the plaintiff-respondent. Their Lordships animadvert upon the course in these terms: "It appears to their Lordships to be highly irregular for any Court either to assume without the admission of all parties that material facts are not in dispute or to proceed to draw inferences from those facts where no evidence of them has been placed before the Court." However, on appellant's consenting to proceed upon the basis of the facts assumed their Lordships considered the question and arrived at the conclusion as stated above.

The following points seem to be decided by their Lordships:—

(*i*) For the application of Art. 134 the fact that at the time of the transfer the mortgagee had ceased to be a mortgagee or that he did not take possession as mortgagee was immaterial. It was also immaterial that he should have thought he was absolute owner if in fact he was only a mortgagee and similarly immaterial whether he got possession before, under or after the mortgage if in fact he purported to transfer the property to the transferee.

(*ii*) The transfer contemplated by Art. 134 is a transfer other than an express transfer of the original mortgage.

(*iii*) If at the date of the transfer, the equity of redemption vested in a life-estate holder, in such a case Art. 140 applied and till the remainder fell into possession, time did not begin to run.

(*iv*) If, at the time of the transfer, the equity of redemption vested in a person holding in fee, time would begin to run and would not stop running by the fact that before the limitation period expired, it vested in some other person for life.

As a result their Lordships held the subsequent alienations being ineffective in law to convey title, and the defence of limitation being also not available, the position of the defendant was that of a mortgagee and he was liable to be redeemed under Art. 148 within 60 years of the period prescribed for redemption under the document.

The reasoning of their Lordships would seem to be equally applicable to cases coming under Art. 141 and as a result cases like *Sesha Naidu* v. *Periasami Odayar*[1] which hold that in a case of conflict between Arts. 134 and 141, the former should prevail would no longer be good authority.

1. (1921) I.L.R. 44 M. 951: 41 M.L.J. 163.

ANNAJI RAMCHANDRA *v.* THAKUBAI DATTATRAYA, I.L.R. 53 Bom. 335.

Questions similar to the one in the present case, *i.e.*, of an improper order of remand by the Lower Appellate Court, have come frequently before the High Court in recent years. Granting that an Appellate Court has a power of remand in the exercise of its inherent jurisdiction and apart from the provisions of Order 41, Rule 23 (see *Ghuznavi* v. *Allahabad Bank, Ltd.*[1] and *Radhakrishna Rao* v. *Venkata Rao*[2]) it must obviously be restricted to cases where the Appellate Court cannot do justice under the other provisions of the Code, such as O. 41, Rr. 25 and 27. In the case under notice, the Appellate Court could well have acted under O. 41, R. 25; consequently the High Court interfered with the order of remand and pointed out the proper procedure to be adopted. It is not difficult to point to instances where the Appellate Court can rightly pass orders of remand under its inherent jurisdiction; one of such cases would be where the Appellate Court orders an amendment of the plaint. *Radhakrishna Rao* v. *Venkata Rao*[2] and *Karuppanna Pillai* v. *Ezhumalai Pillai.*[3] If as the learned Judges hold in the case under notice the order of remand is not one falling under O. 41, R. 23, it is not clear how an appeal could lie to the High Court under O. 43, R. 1 (*u*). Compare *Sheikh Muhammad Maracayar* v. *Rengasami Naidu*[4] and *Radhakrishna Rao* v. *Venkata Rao*[2] It is possible that the learned Judges interfered with the decision in the view that though there might be no appeal, it was open to the High Court to interfere in its revisional jurisdiction. In this connection it is interesting to notice the decision of the Madras High Court in *Venkamma* v. *Goparaju Perraju,*[5] where it was held that though the Appellate Court had no power to act under O. 41, R 23, as the decision of the first Court was not on a preliminary point and though the Appellate Court might have acted under O. 41, R. 27 and consequently it should not have remanded the case under its inherent powers, the High Court could not interfere in revision under S. 115 of the Civil Procedure Code. See, however, *Venkatarama Aiyar* v. *Sundaram Aiyar.*[6]

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1. (1917) I L R. 44 C 929 (F.B)
2. (1924) I.L R. 48 M 713 · 47 M.L.J. 552
3. A.I.R. 1927 M 849.
4. (1921) 16 L.W 515.
5. A I.R. 1928 M 991: (1928) M.W.N. 164.
6. (1926) M W.N 48 92 I.C. 1045

RAM KALI *v.* KHAMMAN LAL, I.L.R. 51 All. 1.

BANKE BIHARI *v.* BRIJ BIHARI, I.L.R. 51 All. 519.

Both these cases deal with the question of partition, that is to say, how far a declaration of intention, unilateral and otherwise, is affected by subsequent change of intention. Separation can be effected by the unequivocal declaration of one member of his intention to separate but such a declaration can affect only his status and the status of his branch but not that of the other members *inter se*. Much difference of opinion is possible on the facts as to whether the declaration especially when it is couched in notices or is to be inferred from conduct, is intended to be final or only tentative—in other words, whether the separation is only an attempted separation or a completed separation. The effect of one piece of conduct might be destroyed by another. The declaration has got also to be communicated to others before it can take effect. There is undoubtedly *locus poenitentiae* before communication to all the members. Even after communication to other members, the Privy Council has ruled in *Palani Ammal* v. *Muthuvenkatachala Moniagar*[1] that the intention may be abandoned before the intention so declared is given effect to by a decree of Court. When once the decree is passed it is no longer possible for the individual member to recall his expressed intention. The same must be the case where the members agree to his declaration and consent to partition. Thereafter the only possible way in which the family can become joint is by agreeing to be reunited. Before the offer of partition is accepted by the other members, it should be open to the party making the offer to withdraw. The second of the cases under review lays down that with the consent of the other members, it can be withdrawn. But that does not exclude the position that the declaration of intention can be withdrawn even without consent so long as it has not been acted upon and resulted in a final severance. A statement apparently *in curiam* in the earlier case that an explicit declaration cannot be withdrawn is commented on and explained in the later case.

RUKIA *v.* MEWA LAL, I.L.R. 51 All. 63.

Two persons were added as legal representatives of the plaintiff who claimed as reversioner—one was the widow and the other was her son who though not son by the deceased was according to her entitled to succeed by caste custom. The Court

1. (1924) L.R. 52 I.A. 83: I.L.R. 48 M. 254 48 M.L.J. 83 (P.C.).

upheld the custom and gave a decree to the son. On appeal by the other side making only the son a party the Court found against the custom and then the question was whether the Court could give a decree in favour of the widow under O. 41, R. 33. Their Lordships held they should not. O. 41, R. 33 is, their Lordships say, invests the Court with an exceptional power and it should be sparingly exercised. At one time, Courts were disposed to be somewhat liberal, especially the Madras High Court, but there has been stiffening since. The English precedents cover only cases of alternative claims which form the subject of the illustration to the rule and cases of re-trial, but it is conceded that the power is not confined to such cases. The power of the Court to interfere would be very much circumscribed if the narrow construction of O. 41, R. 20 as to making of parties suggested in *Chockalingam Chetti* v. *Seethai Ache*[1] is adopted. There might be a difference between making a decree against a person in his absence and making a decree in his favour. The view taken in this case is that in either case you can interfere only in favour of the persons who are actually parties to the appeal.

SURAJ NARAIN *v.* SUKHU AHIR, I.L.R. 51 All. 164 (F.B.).

The point that fell to be considered in this case was as to whether a bond by a minor given after attaining majority in renewal of a bond given during minority for cash borrowed could be supported under S. 25 of the Contract Act. There is considerable conflict of authority on the subject and the Allahabad High Court by a majority decide in this case that it cannot be so supported. The view taken is the same as that taken by the Madras High Court in *Ramaswami Pandia Thalavar* v. *Anthappa Chettiar.*[2] The ground of the decision is that the payment was consideration for the bond and was exhausted. If the bond was valid, that could form the consideration for the new bond but the bond being void under the law the consideration could not again form consideration for a valid bond. As for cl. (2) of S. 25 the argument is that it is not a case of something voluntarily done nor could the bond be said to be a promise to compensate. As for the latter argument, there is a whole volume of authority under Art. 116, Limitation Act, which applies the article to mere promises to pay money. But the real argument is what is done upon request and with a view to a contract is

1 (1927) L.R. 55 I.A. 7· I.L.R. 6 Rang. 29 54 M.L.J. 88 (P.C)
2 (1906) 16 M.L.J. 422.

not something voluntarily done and you cannot erect the consideration of a contract declared by public policy to be void into a voluntary service or act within the meaning of S. 25. The distinction is very subtle and naturally does not appeal to all minds, for instance, it did not appeal to Justice Mukerji in this case. The danger of minors who have just attained majority being persuaded to give a bond for old bonds given during minority is a real danger and the judgment of the majority recognises that danger and gives effect to the stricter and the literal view of the section.

KUNJ BIHARI *v.* BINDESHRI PRASAD, I.L.R. 51 All. 527.

In this case, the decision is that if a payment is directed to be made within a certain time by a decree but there is no provision in the decree that the amount is to be paid into Court the judgment debtor cannot take advantage of the fact that the Court was closed and make the payment into Court on the reopening day. A different view has been taken in *Wana mard Ravji* v. *Natu walad Murka*[1] and *Sankaran Unni* v. *Raman.*[2] Seeing that Order 21, Rule 1 gives the judgment-debtor an option, we prefer the view taken in these cases. Under S. 10 of the General Clauses Act on which reliance is placed in *Wana mard Ravji* v. *Natu walad Murka,*[1] the rule is applicable not only to cases in which an act is directed to be done but also to cases in which the act is allowed to be done. The language is wide enough to cover the case, but even supposing as Mr. Justice Krishnan thinks in *Sankaran Unni* v. *Raman*[2] that the section cannot apply to the case of acts directed to be done by *decrees* as distinguished from those directed to be done by *Acts* or *statutes,* the cases that recognise the principle (see, for instance, *Aravamudu Aiyangar* v. *Samiyappa Nadan*[3]) do not make any such distinction though the distinction was available. When the statute gives one an option, it is not, we think, for the Courts to say that he is bound to make the payment directly to the decree-holder on pain of his losing the benefit of any concession shown to him by the decree.

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1 (1910) I L R. 35 B. 35 2 (1924) 48 M.L.J. 596
3. (1898) I.L.R. 21 M. 385

RANEEGUNGE COAL ASSOCIATION, LTD. *v.* TATA IRON AND STEEL CO., LTD., I.L.R. 53 Bom. 271.

The learned Judges have held in this case that the circumstance that a reference to arbitration turns on a question of law is not by itself a ground under section 19 of the Indian Arbitration Act for the Court to refuse a stay of the proceedings in a suit on the same subject-matter. The decision would, we believe, have been the same if the question had arisen under cl. 18 of the 2nd Schedule to the Civil Procedure Code of 1908. The reference in the case was one regarding the construction of a business contract relating to a colliery and the arbitrators appointed under the contract were the Bengal Chamber of Commerce who would be more competent to understand the terms of such a contract than a Court of Law. After the decision of the Court of Appeal in *Metropolitan Tunnel and Public Works* v. *London Electric Ry. Co.,*[1] where most of the cases referred to by the learned Judges in the case under notice have been considered, there can be little doubt, that there should be a stay of suit in such a case. The reasons for a stay of suit are stronger under the Indian Arbitration Act than under the corresponding English Act, as pointed out by the learned Judges, because there is no power under the Indian Act to compel an arbitrator to state a case on a question of law and his decision on the question of law would be final unless by reason of the mistake of law by the arbitrator, the award falls within the restricted class of cases of error apparent on the face of the record. Indeed, it has been held in this country that a refusal to state a case on a question of law under section 10 of the Act would not amount to misconduct on his part. (See *Arunachela Aiyar* v. *Louis Dreyfus & Co.*[2] and *Sewdutrai Narsaria* v. *Tata Sons, Ltd.*[3]) It may, however, be pointed out that if in the course of the arbitration proceedings, the arbitrator is about to commit a mistake on a pure question of law, it would be open to parties to move the Court under section 5 of the Arbitration Act to revoke the submission. (See *East and West India Dock Company* v. *Kirk and Randall*[4] and the cases referred to therein and *Sewdutrai Narsaria* v. *Tata Sons, Ltd*[3].) The Court may then revoke the submission in a proper case, unless the arbitrator agrees to state a case on the question of law. If, however, the parties do not immediately apply for a revocation of the submission, but wait till the award is passed they can no longer object to the award on the ground of misconduct for this reason. In this connec-

1. (1926) 1 Ch. 371.
2. (1927) 27 L.W. 267.
3. (1921) 27 C.W.N. 494
4. (1887) 12 A.C. 738.

tion it may be mentioned that if a case is stated by the arbitrator on a question of law to the Court, the opinion of the Court is not liable to appeal as being merely passed in its consultative jurisdiction for the guidance of the arbitrator. If, however, the arbitrator sets out the opinion of the Court on the face of his final award and acts upon it, if the opinion of the Court is wrong, it would be open to the Court afterwards to still set aside the award, on the ground of error apparent on the face of the record, thus correcting the wrong opinion originally given by the Court. See *British Westinghouse Electric and Manufacturing Co., Ltd.* v. *Underground Electric Railways Company of London, Limited.*[1]

PARSHARAM YESHWANTSHET *v.* LAXMIBAI, I.L.R. 53 Bom. 360.

In this case, the learned Judge has held following *Subrao Mangeshaya* v. *Manjapa Shetti*[2] that a permanent lease granted by a mortgagor in favour of the mortgagee subsequent to the creation of the mortgage and as a distinct transaction is invalid as a clog on the equity of redemption and therefore not binding on the mortgagor. No objection can be taken to the decision if it were based on any ground of undue influence or fraud exercised by the mortgagee on the mortgage in obtaining the permanent lease, the burden of proving the circumstances leading to the undue influence or fraud being on the mortgagor as in any other case. (See *Melbourne Banking Corporation, Ltd.* v. *John Brougham.*[3])

If, on the other hand, the decision has been rested on any rule of equity that a permanent or long lease by the mortgagor to the mortgagee after the mortgage is invalid apart from any undue influence exercised in the particular transaction, we venture to think that the matter requires a closer attention having regard to the English cases and the grounds of decision of those cases. It must be pointed out at the outset that even in the case of *Hickes* v. *Cooke*[4] Lord Eldon does not take the same view as Lord Redesdale that such leases are invalid apart from any question of undue influence or unconscionable bargain. His Lordship held that such leases even though imprudent or foolish would be valid. It must be remembered that the case itself went off on the question of laches and the validity of the lease did not come up for direct decision. Regarding the validity of the leases by the mortgagor to the mortgagee the observations of

1. (1912) A.C. 673.
2. (1892) I.L.R. 16 Bom. 705.
3. (1882) 7 A.C. 307.
4. (1816) 4 Dow. 16.

both the noble Lords do not agree as pointed out above. Coming to the decision of Lord Redesdale, his Lordship was a party to two prior decisions on the same question in *Gubbins* v. *Creed*[1] and *Webb* v. *Rorke*.[2] In the first of these cases, his Lordship distinctly opened the judgment with the words that a lease by the mortgagor to the mortgagee would not be for that very reason invalid and found in that case undue influence and set aside the lease on that ground. In the second case, the first ground on which such leases were said to be invalid was that they were opposed to the spirit of the usury laws, a ground which is no longer valid as pointed out by the House of Lords in *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.*[3] The second ground was that the mortgagor would not be allowed to grant a lease of the mortgaged properties to third persons without the consent or concurrence of the mortgagee and if he did grant a lease to a third person on more profitable terms, the mortgagee could oust the tenant by entering on the properties under his power as an English mortgagee. It will be easily recognised that this ground is inapplicable in this country to the case of simple mortgages as a simple mortgagee has no right to possession and so cannot force the mortgagor to grant the lease to him on less favourable terms than to a stranger. Again, after the recent decision of the House of Lords in *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.*,[3] where the nature of a clog on the equity of redemption was fully discussed and placed beyond doubt by Lords Haldane and Parker, it cannot be contended that a mortgagee can in no case stipulate for a collateral benefit beyond the principal, interest and costs on the mortgage amount. (*See* pp. 38 and 55.) The suggested distinction between the cases of sales of the equity of redemption and leases has not been accepted even in England. (See *Ford* v. *Olden*.[4]) As pointed out by Jessel, M.R., in *In re Hallet's Estate*[5] and by Lord Haldane in *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.*[3] the older cases in equity are not of such great authority as in the Common Law which is supposed in legal theory to be immemorial. In the face of these considerations, one can very well follow the doubts entertained by the late Sir Rash Behari Ghose on the soundness of the decision in *Subrao Mangeshaya* v. *Manjapa Shetti*[6] which the learned Judge has followed in the case under notice.

1. (1804) 2 Sch & Lef 214: 9 R.R 71.
2. (1806) 2 Sch. & Lef 601 · 9 R.R. 122.
3. (1914) A.C. 25 at 38, 55 and 56
4. (1867) 3 Eq. 461
5. (1879) 13 Ch. D. 696.
6. (1892) I.L.R. 16 B. 705.

RABINDRA NATH DAS *v.* JOGENDRA NATH DEB, I.L.R. 56 Cal. 432.

Two propositions of law have been laid down by the learned Judges in this case. As to the second, namely, that though a prosecution when started may have been *bona fide*, it may cease to be such when circumstances are discovered which would show that there are no grounds for it and that a continuance of the prosecution thereafter would give rise to a claim for damages for malicious prosecution, it is well founded on principle and amply supported by authority. The other proposition that an application for sanction to prosecute is itself a prosecution on which an action for malicious prosecution can be grounded is as recognised by the learned Judges themselves open to serious doubt. All that is determined in such an application is the question whether there should subsequently be a prosecution or not. Such an inquiry is quite a distinct one from the prosecution itself which comes in at a later stage. It is on this aspect of the matter that the cases where a complaint has been made, but the Magistrate calls for a report from the police or himself ascertains even after notice to the accused, whether the complaint should be entertained and summons or warrant should issue have a bearing. In *De Rozario* v. *Gulab Chand Anundjee,*[1] *Golap Jan* v. *Bholanath Khettry,*[2] *Sheik Meeran Sahib* v. *Ratnavelu Mudali*[3] and *Arunachella Mudaliar* v. *Chinnamunusamy Chetty*[4] it has been held that at this stage it is not a prosecution but only an inquiry whether there should be a prosecution or not and that prosecution commences only after a summons or warrant is issued to the accused to answer the charge. Again, as the learned Judges themselves point out, even after the sanction, the prosecution does not follow *naturally* from the order granting sanction to prosecute as in the case of giving information to the proper authorities from which, in the natural course, a prosecution follows (cf. *Balbhaddar Singh* v. *Badri Sah*[5]) because though a sanction to prosecute has been given, the person to whom it is given is not bound to prosecute the other. It cannot, therefore, be asserted that when the question comes to be examined on principle, the decision in *Narendra Nath De* v. *Jyotish Chandra Pal,*[6] which the learned Judges have followed, may not be reconsidered.

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1 (1910) I.L.R 37 Cal. 358 2 (1911) I.L.R. 38 Cal. 880.
3. (1912) I.L.R. 37 Mad. 181: 25 M.L.J. 1.
4. (1926) 24 L.W. 22. 5. (1926) 51 M.L.J. 42 (P.C.).
6. (1922) I.L.R. 49 Cal. 1035.

SUKHAN *v.* THE CROWN, I.L.R. 10 Lah. 283 (F.B.).

The question referred to the Full Bench was how much of the confessional statement made to the Police which was to the effect "I had removed the *karas*, pushed the boy into the well and had pledged the *karas* with *A*" was admissible in evidence under S. 27 of the Indian Evidence Act. The majority hold that the only portion of the statement admissible is that the accused had pledged the *karas* with *A*. The dissenting minority hold that S. 27 renders admissible the statement, *viz*, "I had removed the *karas* and had pledged them with *A*." The judgments discuss the question elaborately with reference to the previous decisions of the various High Courts. It must be conceded that the admissibility of the statement does not depend upon the actual language in which the confession is made by the accused. The section allows so much of the information as relates distinctly to the fact thereby discovered to be proved. The admissibility of the information must depend upon its intrinsic character and not upon the manner in which the sentence conveying the information is framed by the Police officer or the prisoner. If therefore the accused in this case had stated that he had removed the *karas* from the boy whom he pushed into the well and pledged them with *A*, even then the portion of the statement that he pushed the boy into the well cannot become admissible under S. 27. This much is conceded by all the Judges. There are however certain decisions which take the view that it is not permissible for the Court to split up the language used by the accused in conveying the information. See for instance the observations of the Judges referred to in *Sogaimuthu Padayachi* v. *King-Emperor*.[1] It is submitted that the correct view is however that laid down by the Full Bench in this decision. On the question on which however there was a difference of opinion among the learned Judges, *viz.*, whether the portion of the statement "I had removed the *karas*" was admissible, we think the view of the minority is to be preferred and is in accordance with the more recent decisions of the High Courts. What sets the Police on motion is not the mere information that some *karas* were pledged with *A* but that the *karas* that were being worn by the deceased boy were pledged with *A*. That portion of the statement is therefore one that "relates distinctly to the fact thereby discovered" and should be received in evidence. We think the majority view is unduly restrictive of the scope of S. 27. On the other point that S. 39 of the Evi-

1 (1925) I.L R. 50 Mad. 274

dence Act cannot let in as evidence what cannot directly come in under S. 27 and is prohibited under Ss. 24, 25 and 26 the view of the majority is certainly correct and should be accepted. The judgments in the case deal with the questions very fully and are instructive.

SRIMATI SARAT KUMARI BIBI *v.* RAI SAKHI CHAND BAHADUR, L.R. 56 I.A. 62: I.L.R. 8 Pat. 382: 56 M.L.J. 130 (P.C.).

It is well established that a party who propounds a will must satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator. Where however circumstances exist which excite the suspicion of the Court and whatever their nature may be, it is for those who propound a will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of a document. (See *Tyrrell* v. *Painton*.[1]) A typical instance of cases of that sort will be where the person who writes or prepares a will takes a large benefit under it as laid down in *Barry* v. *Butlin*.[2] The Privy Council hold in this case that the "benefit" need not be (as the High Court held) "a pecuniary benefit, a legacy, for instance, more or less of a substantial nature." The will set up in this case purported to appoint the person who prepared it, a manager of the testator's estate for life at a salary of Rs. 250 a month. He was also allowed to debit the estate with proper conveyance charges, travelling expenses and daily diet expenses. There was a further provision for an increment of salary in case the income of the estate increased. Their Lordships hold that that person received a benefit within the meaning of the rule in *Barry* v. *Butlin*.[2] On the evidence their Lordships find that the testator was not aware of the aforesaid provisions of the will but that he was aware of and approved, all the other provisions of the instrument propounded as his will. The further question arose whether probate of the will could be given omitting the provisions not shown to have been inserted with the knowledge and approval of the testator. As the latter part is so distinct and severable from the true part, that the rejection of it does not alter the construction of the true part, probate was granted of the rest of the document. This is on the principle that execution of what was shown to be the true will and something more may

1. (1894) P 151. 2. (1838) 2 Moo P.C. 480

be treated as execution of the true will alone. The position may be different where the rejection of the words alters the sense of the remaining portion. A will may in such circumstances stand on a different footing from an instrument *inter vivos.*

AMBIKA PRASAD *v.* CHANDRAMANI KUER, I.L.R. 8 Pat. 396.

After the explanation of the true import of the judgment in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[1] as expounded by the Privy Council in the later case of *Rangasami Gounden* v. *Nachiappa Gounden*,[2] there is no reason why the learned Judges should have felt themselves constrained by the facts of the earlier decision to hold as they did, that even a consent of the next reversioner to an alienation by a limited owner which is procured by giving him a substantial consideration should operate to raise a presumption of necessity so as to shift the onus of proof from the alienee. The doctrine that consent operates *proprio vigore* to validate the alienation was expressly rejected by the Privy Council. Its only value is "as affording evidence that the alienation was under circumstances which rendered it lawful and valid." If therefore the question becomes one of evidentiary value to be attached to the consent, a purchased consent may in the circumstances be obviously such as to give no reasonable ground for holding that the sale was for necessary or proper purposes. The Court is not in such circumstances compelled to hold as a matter of law that the alienation supported by such a consent is necessarily valid unless proof is forthcoming that the same was not for binding purposes. There is nothing in principle which justifies the Court in laying down a rule of law to that effect. Such a view is really opposed to the observations of the Privy Council in the *Gounden case* at page 534.

Their Lordships have pointed out that the true theory is only that which holds that consent does not give force *per se*, but is only of evidential value. They further point out that the contrary view will make the rule as to total surrender an idle one and also that it is based on the fallacy that the reversioner together with the widow represents the estate. There can therefore be no intermediate view that any sort of consent irres-

1 (1907) L R. 35 I.A. 1: I.L.R. 30 All. 1. 17 M L.J. 605 (P.C).
2 (1918) L R. 46 I.A. 72 I.L R. 42 Mad 523: 36 M.L J. 493 (P.C).

pective of its nature and the circumstances attending it, must shift the onus of proof from the alienee to the person who objects to the alienation. In the very case decided by their Lordships, though the consent was a real and free one it was totally futile as the transaction being a secular gift could not obviously be a justifiable alienation. It should also be borne in mind that the consent of the reversioner which is referred to by the Privy Council as raising a presumption of necessity is described as the "consent of such reversioners as might fairly be expected to quarrel with the transaction," if it were not really for justifiable purposes. In a case where the alienation is by a widow to the next reversioner himself, it would follow that the consent of the alienee himself cannot in the circumstances be regarded as the requisite "consent" within the rule laid down by the Privy Council and the alienation cannot be supported on that basis alone (apart from any question of surrender or of actual necessity). The onus even in such cases must be on the alienee to justify the sale in his favour.

A purchased consent cannot have a different effect and must really be treated as a fraudulent exercise of power on the part of the reversioner at any rate in cases where it is not shown that the consent would have been forthcoming even if consideration were not paid. Its effect, however, on the person who consents is different as he cannot attack the alienation if he turns out to be the actual reversioner. This is of course on the principle that he has elected to treat the transaction as good. Even if a presumptive reversioner gives his consent to an alienation without any consideration it has been held that he is personally precluded from objecting to the transaction later on. See *Ramakotayya* v. *Viraraghavayya.*[1]

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1 (1928) 56 M.L.J. 755 (F.B.).

MAUNG PO KYAW *v.* MA LAY, I.L.R. 7 Rang. 18.

About three days after the pronouncing of the judgment, the appellant through his pleader applied for a copy of the judgment and decree. Whether the application was made orally to the clerk of the Court or in writing, it does not appear from the report. The clerk of the Court appears to have told the pleader that as the decree was not ready by then, the application for a copy of the non-existent decree could not be accepted. The pleader without demur accepted the statement and deferred applying for the decree copy till the decree was signed. The application was diligently made the next day after the decree was signed by the Judge. The Court held that this was not an effective application for a copy of the decree and that the interval between the date of pronouncing the judgment and signing the decree could not be excluded in computing the "time requisite for obtaining a copy of the decree" within the meaning of S. 12 of the Limitation Act, 1908. All the High Courts, except Calcutta —where too the decisions are by no means uniform—have held that the period could not be deducted unless steps had actually been taken to obtain copies by an application put in after the judgment, as the delay in the office is none of the applicant's concern. The Patna High Court which for some time held, following *Bani Madhub Mitter* v. *Matungini Dassi*,[1] that the period could be deducted has now fallen in line with the other High Courts (see *Jyotindranath Sarkar* v. *The Lodna Colliery Co*[2]) and the Calcutta High Court has, after *Pramatha Nath Roy* v. *Lee*,[3] modified the original absolute rule and held that the test is the conduct of the appellant and whether any period claimed to be deducted need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order. See *Kamruddin Hyder* v. *M. N. Mitter*.[4]

The facts in the case under notice seem to be *ad idem* with those in *Tarabati Koer* v. *Jagdeo Narain*,[5] where an application was put in and was formally returned with an endorsement that the decree was not ready and the application must be renewed later. But as in Calcutta the more liberal view then prevailed, much help may not be derivable from that decision. In *Pramatha Nath Roy* v. *Lee*[3] their Lordships in explaining *Bani Madhub Mitter* v. *Matungini Dassi*[1] say that "In that case judgment was

1 (1886) I.L R. 13 C 104 (F.B). 2 (1921) 6 Pat. L.J. 350 (F.B.).
3. (1922) L.R. 49 I.A. 307: I.L R 49 C 999: 43 M.L.J. 765 (P C).
4. (1924) I.L.R. 52 C. 342. 5 (1911) 15 C.W.N. 787.

pronounced on July 17, 1883 and the decree was signed on July 23, so that only six days elapsed between the pronouncing of the judgment and the signing of the decree. *It would be impossible for anybody to suggest that that was an unreasonable time.*" If this means that where the decree is signed within a reasonable time after the judgment is pronounced, the interval can be excluded, it will mean that the party is liable to be punished for any unreasonable delay in the office.

As under O. 20, R. 7, Civil Procedure Code, the decree is directed to bear the date when the judgment is pronounced, it has been uniformly held that the "date of the decree or order" in Arts. 151 to 157 of the Limitation Act means the date of the judgment and the difference of opinion arose only in connection with the words "time requisite to obtain a copy of the order or decree" in S. 12. Though the failure to pronounce a judgment in open Court as required by O. 20, R. 1 may for some purposes be treated as a mere irregularity, yet if the parties or their pleaders had no notice of the judgment, then the date of the judgment is only the date when they get to know of the judgment. See *Mahomed Akil* v. *Assadun-nissa Bibee*[6] and *Sagarmal Marwari* v. *Lachmisaran Misir.*[7] The question has arisen under special Acts like the Survey and Boundaries Act, Registration Act, etc. and it has been held under those Acts that the date of the "making of the order" is the date when the order is pronounced, where it is pronounced immediately after hearing the parties but where orders are reserved, then the date when the order is communicated to the parties (see *Annamalai Chetti* v. *Colonel J. G. Cloete,*[8] *Secretary of State for India in Council* v. *Gopisetti Narayanasami Naidu,*[9] *Muthiah Chetty* v. *Suppan Servai,*[10] *Abdul Ali* v. *Mirja Khan*[11] and C.M.A. No. 269 of 1928 (Madras High Court). But what is to happen if one party is present and the other is absent and the tribunal hearing the party present pronounces the order immediately? The logical result of the reasoning in some of the cases would suggest that the date of "the making of the order" as against the absent party is the date when it is communicated to him.

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6 (1867) 9 W R 1

7 (1922) I.L.R. 1 Pat. 771

8 (1883) I.L.R. 6 M 189

9. (1910) I.L.R. 34 M. 151.

10. (1913) I L.R. 38 M. 291.

11 (1903) I.L.R. 28 B 8.

HANUMAN PRASAD SINGH *v.* MATHURA PRASAD SINGH, I.L.R. 51 All. 303 (F.B.).

In the Civil Procedure Code of 1882 there was no mode of execution provided in the case of decrees for joint possession of immoveable property. The present Code has supplied the defect in O. 21, R. 35 (2). We do not have questions of joint possession cropping up as frequently in Madras as in Allahabad or Calcutta for the obvious reason that we do not have here the kind of joint holding they have there. In this case, their Lordships hold that the fact that the plaintiff the joint owner has not been previously in possession is no ground for disallowing a decree for joint possession in his favour. They also hold that the Court has a discretion in the matter of granting a decree but that the discretion must have reference to the rights and interests of the parties concerned and not to such considerations as its usefulness, practicability or the likelihood of the decree leading to quarrels or rioting. If there has been long separate possession with the acquiescence of the joint owners and there has been no denial of title or ouster, a decree for joint possession will not be given In those circumstances the remedy for the party who is not satisfied with the arrangement is to sue for partition. Joint possession is at best a very unsatisfactory state of thing when parties quarrel and the real reason why such a decree is sought for in those provinces consists in the fact that it affords facilities for the obtaining of a decree for partition in the Revenue Courts.

ANWAR KHAN *v.* MUHAMMAD KHAN, I.L.R. 51 All. 550 (F.B.).

The point that arose for consideration in this case was as to the power of the Insolvency Court to deal with the title of a transferee long before adjudication under S. 4 of the Provincial Insolvency Act. The language of this section is similar to that of S. 7 of the Presidency Towns Insolvency Act and the scope of that section was the subject of a decision of a Full Bench of the Madras High Court in *The Official Assignee of Madras v. Narasimha Mudaliar.*[1] The view indicated in that case which is in accordance with that expressed by Mr. Justice Rankin (as

1 (1929) I.L.R. 52 M 717 57 M.L.J. 145 (F.B.).

he then was) in *Jnanendra Bala Debi* v. *The Official Assignee of Calcutta*[2] is that though the Court has very wide powers, it has a discretion in the matter and the discretion should not ordinarily be exercised as, for instance, to make a decree against the debtors of the estate when the truth of the debt is in dispute or to pronounce upon a question of *benami* in respect of a transaction several years old and so forth but only in cases where the Official Receiver has a superior title to that of the bankrupt, *e.g.*, in addition to cases of fraudulent preference and voluntary alienations also in case of alienations, etc., coming under section 53 of the Transfer of Property Act and alienations or change of possession after an available act of bankruptcy. Ss. 53 and 54 of the Provincial Insolvency Act confer special rights on the Official Receiver of avoiding certain transfers which cannot but for those sections be avoided at all. The Court would have no power under S. 4 to set aside transactions on the ground of fraudulent preference or on the ground of their being voluntary alienations except in the manner and subject to the conditions imposed by those sections. There are other sections of the Act which confer special rights on the Receiver and also provide for special exemptions, *see* for instance S. 51 of the Act in case of execution creditors and execution purchasers. These and similar questions which turn upon the special rights created by the act are appropriate matters to be dealt with under S. 4. When other questions of title are dealt with by the Court in its discretion the ordinary law and procedure will have to be followed. *See* for cases of such exercise *Ramaswami Chettiar* v. *Ramaswami Aiyangar*,[3] *Chittammal* v. *Ponnusami Naicker*[4] and *Venkatram* v. *Chokkier*,[5] which indicate the extent to which the Court has proceeded and also the limits beyond which it has declined to proceed. For instance in the last case, while upholding the Lower Court's order to deliver possession of the father's (insolvent's) share to the purchaser, the High Court declined to make a similar order as regards the son's share. According to the case under review, the matter is for the sound discretion of the Court.

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2. (1925) I.L.R. 54 C. 251.
3. (1921) I.L.R. 45 M. 434: 42 M.L.J. 185.
4. (1925) I.L.R. 49 M. 762: 50 M.L.J. 180.
5. (1927) I.L.R. 51 M. 567: 55 M.L.J. 163.

BASDEO NARAIN *v.* MUHAMMAD YUSUF, I.L.R. 51 All. 285.

Their Lordships applied in this case the test laid down in *Jagat Narain* v. *Mathura Das*[1] which held that "benefit" that would justify an alienation by the managing members need not necessarily be for "defensive" purposes to a permanent lease on a favourable rent accompanied by payment of a large premium. Their Lordships held that even so, the lease could not be justified as taking ready money and permanently leasing family property at favourable rent without more cannot be regarded as *beneficial* within the meaning of the rule laid down therein.

TOSHANPAL SINGH *v.* THE DISTRICT JUDGE OF AGRA, I.L.R. 51 All. 386.

In determining whether sons are liable for the debts of the father, it has been laid down generally that if there is an antecedent civil obligation with nothing criminal in it out of which the liability to pay arose, the sons are liable though his subsequent acts with reference to it assume also a criminal character. If the act out of which the liability arises is criminal the fact that there is a civil liability to pay compensation imposed by law would not impose upon the sons the duty of discharging it. The effect of these decisions is to restrict the exemptions to a very narrow margin. Applying this test, an agent or servant who has in his custody money by such fact of custody being under a civil liability to return it, the son would be liable even though he might have had no right whatsoever to touch a single pie out of it. Exemption would be available only in cases where the very taking of the thing is criminal. Where the taking is innocent the subsequent appropriation alone being criminal, the son would be liable. Whatever the old Hindu Law rule, that it made such subtle distinctions which are the refinements of modern criminal law, seems improbable. A more satisfactory test would have been possibly to see what the Hindu Law regarded as criminal.

MAUNG BAN GYI *v.* MA NGWE BON, I.L.R. 7 Rang. 107.

Property sold in execution of a money decree and purchased by the decree-holder was restored to the judgment-debtor when, on appeal, the decree was not reversed but only modified by reducing the amount. Considering the extent of the varia-

1. (1928) I.L.R. 50 A. 969 (F.B.).

tion the decision is unimpeachable, but in so far as it proceeds on broad grounds without putting it as a question depending on the extent of the modification, it is open to question. The cases relied on are all under the old Code (S. 583) and it is pointed out in *Bezwada Sundararama Reddi* v. *Enuga Raghava Reddi*[1] (where even the correctness of *Syed Nathadu Sahib* v. *Nallu Mudaly*[2] is doubted) that S. 144 of the Code of 1908 gives a discretion to the Court in granting restitution and does not make it obligatory on the Court to restore the property irrespective of other considerations.

We are not sure if the object of the rule that in the case of the decree-holders purchasing at execution sales, the purchase is subject to the final result of the litigation between them and their judgment-debtors, is to "prevent the interests of judgment-debtors suffering by sales of their property before their liability is finally determined" and to "avoid judgment-creditors profiting at the expense of their debtors by becoming purchasers in sales pending litigation by way of appeal." Stated in this form, the protection of the judgment-debtor's interest will equally be frustrated when a stranger buys the property with knowledge of the pendency of the appeal and yet it has been generally held that the *"bona fides"* required of the stranger is not negatived by mere knowledge of the pendency of an appeal. (See *Raghavachari* v. *Pakkiri Mahomed Rowther*[3] and *Moitheensa Rowthan* v. *Apsa Bivi*.[4]) It will be more reasonable to suggest that the basis of the rule is that the decree-holder must be deemed to have *procured* an erroneous decision, when the same is substantially modified on appeal. In *Official Receiver, Madura* v. *Chettiappa Chetty*[5] the learned Judges hold that not only a purchase by the decree-holder but a purchase by any person who is a party to the suit will be set aside on reversal of the decree. This decision suggests a different line of reasoning which may require further examination as one of the learned Judges (Wallace, J.) seems by no means very positive in the statement of his opinion.

[END OF VOL. LVII.]

1. (1921) 42 M.L.J. 315.
2. (1903) I.L.R. 27 M. 98.
3. (1916) 30 M.L.J. 497.
4. (1911) I.L.R. 36 M. 194: 21 M.L.J. 969.
5. (1925) I.L.R. 48 M. 767: 49 M.L.J. 452.

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NOTES OF RECENT CASES.

Wallace and Walsh, JJ. C.M.P. No. 763 of 1928.
17th July, 1929.

Civil Procedure Code, O. 22, R. 6—Civil Revision Petition—Death of respondent a few days prior to the judgment—Legal representative not brought on record for judgment—Validity of the judgment.

Where in a Civil Revision Petition the respondent died a few days before the hearing and his legal representatives were not brought on record at or before the hearing, but judgment was pronounced allowing the revision petition with the name of the deceased respondent on the record,

Held, that the judgment was invalid and the Civil Revision Petition must be reheard after bringing on record the legal representatives on an application filed by the petitioner within time.

T. S. Ramaswami Aiyar for Petitioner.

S. Rangaswami for Respondent.

N.S.

Anantakrishna Aiyar, J. S.R. No. 18336 of 1928.
18th July, 1929.

Court Fees Act, Art. 17, cl. (b) (2)—Distress under Madras Estates Land Act—Suit for declaration that distress illegal on the ground that the rent claimed was more than that legally due—Dismissal of suit—Appellate Court allowing restraint for a smaller amount of rent—Second Appeal by landlord—Memo. of Objections by ryots—Court-fee payable.

Certain ryots instituted a suit against the landlord under S. 95 of the Madras Estates Land Act for a declaration that the distress levied by the landlord is not legal as no notice of demand of rent was given to them and the amount of rent that was claimed was not

legally due. The suit was dismissed and on appeal the Appellate Court held that the proper amount was a smaller amount and that distress to that extent alone was legal. The landlord preferred a second appeal to the High Court and the ryots put in a Memo. of Objections to the effect that the rent as fixed by the Lower Appellate Court was not a proper rent but only a smaller sum was due. The Memo. of Objections did not raise any general question as to the illegality of the distress *in toto* on the ground of want of notice or some other defect.

Held, that the subject-matter of the Memo. of Objections was not incapable of valuation within the meaning of Art. 17 (*b*) (2) of the Court Fees Act.

P. Satyanarayana Rao for Ryots.

The Government Pleader (*P. Venkataramana Rao*) for the Crown.

N.S.

Venkatasubba Rao and Madhavan Nair, JJ.
18th July, 1929.

L.P.A. No. 291 of 1927.

Transfer of Property Act, Ss. 95 *and* 101—*Redemption of mortgage by a person interested in the property—Equitable subrogation—Presumption of keeping alive the mortgage.*

Sec. 95 of the Transfer of Property Act does not stand in the way of the application of the equitable doctrine of subrogation, where a mortgage is discharged by a person interested in the property and not by a co-mortgagor.

There is a presumption that the person who pays the money in discharge of a mortgage intends to keep it alive.

T. R. Ramachandra Aiyar with *B. Sitarama Rao, K. Kuttikrishna Menon* and *K. P. Krishna Menon* for Appellants.

P. Govinda Menon for Respondent.

N.S.

Venkatasubba Rao and Madhavan Nair, JJ.
19th July, 1929.

C.R.P. No. 876 of 1928.

Limitation Act, Art. 182 (5)—*Step-in-aid of execution—Application for leave to bid and to set off the price against the decree amount.*

An application put in by the decree-holder praying for leave to bid and to set off the price against the decree amount due to him is a step-in-aid of execution of the decree within the meaning of Art. 182 (5) of the Limitation Act.

Per Venkatasubba Rao, J.—An application by the decree-holder for leave to bid at the execution sale is a step-in-aid of execution.

45 Mad. 466 referred to.

Dr. V. K. John and *S. Panchapakesa Sastri* for Petitioner.

Respondent unrepresented.

N.S.

Anantakrishna Aiyar, J. S.A. No. 626 of 1928.
22nd July, 1929.

Hindu Law—Widow—Foreclosure decree against—Suit for declaration by reversioner that decree was fraudulently obtained—Decision in favour of plaintiff—Form of decree.

Where, in a suit instituted by a reversioner for a declaration that a foreclosure decree obtained against a Hindu widow has been fraudulently obtained and hence not binding on the reversion, the Court comes to a decision in favour of the plaintiff, the proper decree that must be passed is to declare that the foreclosure decree is not binding upon the plaintiff or any other person who happens to be the reversioner and that the plaintiff or the person entitled to the reversion would be entitled to redeem the property on the death of the widow on payment of the mortgage amount together with the value of any improvements, if any, effected by the mortgagee.

S. Narayana Aiyangar for Appellant.

Watrap S. Subramania Aiyar for Respondent.

N.S.

Anantakrishna Aiyar, J. S.A. Nos. 260 to 291 of 1926.
23rd July, 1929.

Madras Estates Land Act, S. 3, *cl.* (5) *and S.* 52, *cl.* (3)*—Patta by lessee from landlord—If binding for subsequent faslis.*

Where a patta has been tendered for a certain fasli by a lessee from the landlord for a term of years, it governs the relations between the landlord and the ryot for subsequent faslis also.

K. V. Sesha Aiyangar and *S. Anantharama Aiyar* for Appellant.

M. S. Venkatarama Aiyar and *E. Krishna Aiyar* for Respondents.

N.S.

Venkatasubba Rao and Madhavan Nair, JJ. C.M.A. No. 431 of 1927.
23rd July, 1929.

Mortgage—Redemption—Suit for—Onus of proof—Admission of plaintiff's title by defendant—Effect.

Where in a suit for redemption of a mortgage, the plaintiff alleged that the mortgage deed was destroyed and produced a plain copy of it, and the defendant admitted the title of the plaintiff,

Held, that it was for the plaintiff to prove that the terms of the mortgage were substantially the same as those alleged in the plaint and that the suit was within time, and that the onus was not shifted by the admission of the plaintiff's title by the defendant.

K. Kuttikrishna Menon for Appellant.

P. Govinda Menon for Respondent.

N.S.

Curgenven, J. C.M.Ps. Nos. 2412 and 2517 of 1929.
24th July, 1929.

Civil Procedure Code, O. 39, R. 1—Application for leave to sue in forma pauperis*—If a "suit"—Power of Court to grant* ad interim *injunction.*

A petition for leave to sue in *forma pauperis* is not a "suit" within the meaning of O. 39, R. 1, Civil Procedure Code till it is admitted and, consequently, the Court has no power to grant an order of *ad interim* injunction before it is admitted.

V. Pattabhirama Sastri for Petitioner.

G. Sivaramakrishna Sastri for Respondent.

N.S.

Ramesam and Jackson, JJ. A.S. Nos. 323 and 344 of 1922.
26th July, 1929.

Hindu Law—Partition—Alienee from a coparcener—Compromise of suit—Alienee not a party to compromise—If bound by the compromise.

In a partition action, where besides the members of the joint family, the alienees of some items from one of the coparceners were parties, any compromise come to between the coparceners without having regard to the equities of the alienees, will not bind the alienees and the said suit will have to proceed to work out the alienees' equity to have the alienated items set apart for the alienor's share if possible.

V. K. Srinivasa Aiyangar for Appellant.

T. R. Venkatrama Sastriar, T. S. Ramaswami Aiyar and *M. S. Vaidyanatha Aiyar* for Respondent.

S.V.V.

Venkatasubba Rao, J.
19th April, 1929.

C.M.S.A. No. 34 of 1925
and
C.R.P. No. 544 of 1925.

Civil Procedure Code, S. 48 and O. 21, R. 10—Application for transfer of decree filed within 12 years of the date of the decree—Simultaneous application for execution in the transferee Court—Dismissal of the latter application—Application for execution subsequent to the receipt of the decree but more than 12 years from date of decree—Whether maintainable.

A petition was filed in the Court which passed the decree to transfer it to another Court for execution just before the expiry of 12 years from the date of the decree. Simultaneously a petition was filed in the transferee Court for execution of the decree of this petition was dismissed. After the decree was transferred, a fresh petition was put in the transferee Court to revive the original application for execution which had been dismissed but when this petition was put in, twelve years had elapsed from the date of the decree.

Held, that the application for transfer of the decree was not an application for execution within the meaning of O. 21, R. 10 of the Civil Procedure Code and that, an execution petition in the transferee Court not having been filed subsequent to the receipt of the decree by that Court and within 12 years of the date of the decree, the decree because barred by reason of section 48 of the Civil Procedure Code.

20 A. 78: 16 C. 744: 35 B. 103: 48 A. 121 referred to.

Subba Rao for *P. Venkataramana Rao* for Appellant.

M. Ramachandra Rao for Respondent.

N.S.

Venkatasubba Rao and
Madhavan Nair, JJ.
17th July, 1929.

C.M.A. No. 366 of 1926.

Lease—Deposit—Provision for adjustment of the amount in the last year's rent—Absence of clause of forfeiture —Deposit whether can be forfeited.

Where a lease deed provided that a sum of money which was paid at the time of the deed was to be adjusted towards the rent of the last year of the lease and that, in case of default committed by the lessee, the lessor had the right to re-enter and take possession of the properties with the standing crops thereon, but contained no clause of forfeiture.

Held, that, the amount paid, though it was called a deposit, was not so in the legal sense.

N R C

27 Ch. D. 89: 1909 A.C. 571 referred to.

K. V. Sesha Aiyangar for Appellant.

T. S. Venkatesa Aiyar for Respondent.

N.S.

Venkatasubba Rao and Madhavan Nair, JJ. S.A. No. 409 of 1925.
24th July, 1929.

*Hindu Law—Succession—Bhandhus—*Ex parte materna—*Propinquity and spiritual benefit—Priority.*

Among two persons claiming to succeed to the properties of a Hindu as being his bandhus, the person who is nearer to the deceased in degree or in propinquity or affinity succeeds in preference to the other, although the latter may confer more spiritual benefit on the deceased than the former. The doctrine of spiritual benefit can be applied only in cases where the two claimants are related to the deceased in equal degree.

B. Somayya for Appellant.

V. Govindarajachari for Respondent.

N.S.

Venkatasubba Rao and Madhavan Nair, JJ. C.M.A. No. 333 of 1927.
24th July, 1929.

Insurance policy—Policy issued before Act XIII of 1923*—Policy expressed to be for benefit of wife and children—Applicability of section* 6 *of Married Women's Property Act.*

Act XIII of 1923 does not deal with the question of the applicability of the Married Women's Property Act to life insurance policies before 1913 but an insurance policy which was taken in 1894 and expressed to be for the benefit of the wife and children of the assured is subject to the provisions of the Married Women's Property Act and consequently a trust is created in favour of his wife and children.

37 M. 483 (F.B.) followed.

V. Govindarajachari for Appellant.

B. Jagannadha Das for Respondent.

N.S.

Ramesam and Jackson, JJ. A.S. No. 328 of 1924.
26th July, 1929.

Vendor and purchaser—Sale-deed executed but not registered in time—Vendee put in possession—Promise by vendor to execute a fresh sale-deed and register—Specific performance of—Suit for possession by vendor—Part-performance if can be relied on.

A vendor executed a sale-deed and put the vendee in possession of the properties. The sale-deed was not registered within four months. The vendor thereupon agreed to execute a fresh sale-deed but later failed to do so. The vendee thereupon brought a suit for specific performance and execution of the sale-deed. The vendor also brought a suit for recovery of possession to which the vendee relied on his possession as amounting to part-performance of the contract.

Held, from the promise to execute a fresh sale-deed, the Court could presume that the vendor admitted the failure to register to be due to his own fault and decreed specific performance as there was an undertaking to execute a fresh sale-deed. The vendee can rely on his possession as part-performance in defence to the suit for possession.

16 Mad. 341: 43 Mad. 822: 6 M.L.J. 263 distinguished.

Quaere: If the decision in A.S. No. 281 of 1925 (55 M.L.J. S.N. No. 45) is correct.

Ch. Raghava Rao for Appellant.

The Advocate-General and *P. Satyanarayana Rao* for Respondents.

S.V.V.

Ramesam and Jackson, JJ. A.S. No. 96 of 1928.
29th July, 1929.

Contract Act, S. 74—Penalty—Compound interest at enhanced rate on default—Compensation.

Where a mortgage bond contained a stipulation for payment of simple interest at 10½ per cent. per annum and in default compound interest at 13½ per cent. per annum, the proper compensation to be awarded is compound interest at the original rate instead of simple interest at the enhanced rate.

26 M. 111 dissented from.

34 C. 150 (P.C.) explained.

M. Patanjali Sastri and *C. S. Rama Rao Saheb* for Appellant.

K. V. Sesha Aiyangar and *T. R. Ramachandram* for Respondent.

N.S.

NRC

Anantakrishna Aiyar, J. S.A. No. 1917 of 1927.
30th July, 1929.

Civil Procedure Code, O. 23, *R.* 1, *cl.* (3)—*"Subject-matter" and "claim"—Meaning of—Prior suit against defendant as trustee —Second suit as trespasser—Properties same—Second suit if barred under O.* 23, *R.* 1, *cl.* (3).

A former suit for possession of the properties and for an account on the basis of the defendant being a trustee was withdrawn without leave of Court on the defendant's plea that he was not a trustee. A second suit was brought for the recovery of the same immovable properties on the basis of the defendant being a trespasser.

Held, that the claim was once on basis of a will and next as heir, then the claim in both the suits being as owner, it may be said to be in respect of the same subject-matter as the defendant is no more concerned with any one source of plaintiff's title than with another.

But in this case, the main allegations, the causes of action and the reliefs claimed being substantially different in the two suits, the second suit is not barred by O. 23, R. 1, Civil Procedure Code.

39 M. 987 (F.B.) relied on.

M. Patanjali Sastri for Appellant.

K. Bhashyam Aiyangar for Respondent.

S.V.V.

Kumaraswami Sastri and Walsh, JJ. A.S. No. 423 of 1924.
1st August, 1929.

Civil Procedure Code, O. 33—*Suit filed by paying Court-fee —Court-fee declared insufficient—Incapacity to pay the additional Court-fee—Petition to continue suit as a pauper—If must be presented in person and in the form prescribed by R.* 3.

Rules 2 and 3 of O. 33, Civil Procedure Code, only contemplate cases where permission to file the suit as a pauper is asked for and do not apply to a case, where in a suit already filed by paying a Court-fee, the plaintiff seeks permission to continue the suit as a pauper on the ground that he is not able to pay the additional Court-fee required by the Court. The Court in the exercise of its inherent power can permit the continuance of the suit as a pauper but in so doing will follow as far as possible the procedure laid down in O. 33 and issue notice to the Government regarding pauperism.

38 M.L.J. 146 applied.

C. Rama Rao for Appellant.

P. Somasundaram for Respondent.

S.V.V.

Ramesam and Jackson, JJ. Appeal No. 132 of 1927.
2nd August, 1929.

Evidence (Amendment) Act (XXXI of 1926)*—If retrospective —Co-mortgagors—Acknowledgment by some only—If saves limitation against the rest—Limitation Act, Ss.* 19, 20 *and* 21— *Construction—"Duly authorised"—"Chargeable"—Meaning of—"Co-contractors," if includes co-mortgagors.*

Where in a suit on a mortgage bond an endorsement of payment of interest by two out of the three co-mortgagors was relied on as saving limitation against all the three, and where it was contended that the mortgage was not duly proved under section 68 of the Evidence Act though the execution was not specifically denied in the written statement

Held, (1) that the mortgage was proved inasmuch as the Amending Act XXXI of 1926 amending S. 68 of the Indian Evidence Act is retrospective since it does not affect any substantial right; (2) that the acknowledgment and payment of interest by two co-mortgagors would not save limitation as against the third; and (3) that mere residence in the house looking after the lands and paying kist would not clothe a stranger with authority to acknowledge liability to save limitation against a mortgagor without specific authority on that behalf.

3 L.W. 231 followed.

Co-contractor includes co-mortgagor.

25 Mad. 220 and 55 I.C. 763 followed.

Held further, that there is no distinction between acknowledgment in writing and payment of interest (Ss. 19 and 20 of the Limitation Act) so far as S. 21 of the Limitation Act applies to them. There being no corresponding provision in English Law to S. 21 of the Limitation Act, English case-law would not apply.

11 H.L.C. 115, 11 A.C. 639, 37 Ch. D. 651 distinguished.

"Charge" in S. 21, Limitation Act, connotes not only personal liability but also liability of property.

K. Balasubramania Aiyar and *K. Venguswami Aiyar* for Appellants.

T. M. Krishnaswami Aiyar, N. Sivaramakrishna Aiyar and *R. Sriramachariar* for Respondent.

P.R.N.

Curgenven, J. Cr.R.C. No. 267 of 1929.
2nd August, 1929.

Arms Act, Ss. 10 *and* 19 (*b*)*—Accused not the consignor of firearms—If can be convicted—Criminal Procedure Code, S.* 234*—Receipt of firearms on four different dates and export of the same—Joinder of charges—Legality.*

N R C

A person who is not a consignor of firearms cannot be convicted under sections 10 and 19 (*b*) of the Arms Act.

A joinder of charges for the offence of receiving firearms on four different dates and exporting the same is illegal under section 234 of the Criminal Procedure Code.

Dr. V. K. John for Accused.

K. N. Ganapathi for *The Public Prosecutor* for the Crown.

N.S.

Kumaraswami Sastri and Walsh, JJ. C.M.A. No. 448 of 1927.
7th August, 1929.

Res judicata—*Execution proceedings—Sale proclamation giving a larger amount than due under the decree—Non-objection to—Leave to bid application—Counter therein objecting to the amount—Objection overruled—Leave granted—If impliedly* res judicata.

A razinama decree in a mortgage suit contained a provision for payment of interest but there was no such provision in the personal decree passed later on. In an execution application put in for attachment and sale of the immoveable properties of the judgment-debtors and in the sale proclamation the amount of the decree with interest had been claimed. When the decree-holder applied for leave to bid, the debtor filed a counter containing allegations to the effect that the amount shown was too much. The objections were overruled as mere objections to sale proclamation and late. In the subsequent execution application, the question arose if (*i*) the non-objection to the inclusion of interest in the sale proclamation, and (*ii*) the order of the Court on leave to bid application operated as *res judicata.*

Held, the first contention would imply that the decree itself was superseded by orders in execution which allow more than what the decree granted. Where a property is liable for attachment and sale and is sold, an objection can be raised in subsequent execution proceedings that the amount shown in the previous execution application was not correct.

37 All. 589, 44 All. 159, 1 Pat. 593 referred.

Also an order giving or refusing leave to bid being only a ministerial and non-appealable order, it cannot operate as *res judicata.*

38 Cal. 712 (P.C.) applied.

S. Varadachariar and *A. Swaminatha Aiyar* for Appellant.

S. Ramaswami Aiyar and *R. Krishnaswami Aiyangar* for Respondent.

S.V.V.

Curgenven, J. C.M.P. No. 1662 of 1929.
7th August, 1929.

Receiver—Appeal in a mortgage suit—Allegation that respondent was a poor man and not personally liable—Property insufficient

—Difficulty to realise mesne profits—No allegation of waste—If receiver can be appointed.

The allegation that the party actually in possession of the property was a poor man who cannot be personally sued for mesne profits and the decree may prove difficult of realisation is not an adequate reason for the appointment of a receiver. It would be otherwise of course if there were a well-founded fear that some irreparable mischief might be caused to the corpus of the property.

43 All. 311 followed.

Watrap S. Subramania Aiyar for Petitioner.

S.V.V.

Ramesam and Jackson, JJ. C.R.P. No. 1602 of 1928.
9th August, 1929.

District Municipalities Act—Electoral roll—Wilfully procuring an improper entry therein—Offence under S. 52—If Court can enquire into—Finality of the roll.

Though an electoral roll is final in the sense that the right of the voters wrongly put in the roll to vote cannot be impeached and their votes may be counted, it does not preclude the Court from enquiring into the question whether an offence has been committed under sections 52 to 55 of the District Municipalities Act. The cases under the Legislative Council Rules stand on a different footing, there being no section corresponding to S. 52.

54 M.L.J. 269 followed.

V. Ramadoss and *R. Purushotham Aiyangar* for Petitioner.

T. R. Venkatrama Sastriar and *M. S. Vaidyanatha Aiyar* for Respondents.

S.V.V.

Waller and Cornish, JJ. C.M.A. No. 368 of 1928.
9th August, 1929.

Guardian and Wards Act, S. 25—Petition by father for custody of his child—Maintainability—Conditional order appointing father as guardian—Validity.

Section 25 of the Guardian and Wards Act is applicable to the case of a petition by the father for the custody of his child, even though the child did not live with him at any time.

An order appointing the father as guardian of the property of his son conditionally upon his furnishing security is invalid.

49 M. 809 relied on.

C. Rama Rao for Appellant.

P. V. Vallabacharlu for Respondent.

N.S.

Sundaram Chetty, J. S.A. No. 1782 of 1925.
9th August, 1929.

Civil Procedure Code, O. 21, R. 63—Claim Petition dismissed as being too late—Suit by decree-holder challenging the sale-deed in favour of claimant as fictitious and fraudulent—Onus of proof—Civil Procedure Code, S. 100—Finding of fact—Wrong view as to onus of proof—Interference by High Court.

When a claim petition is dismissed without investigation and a suit is thereafter instituted by the defeated claimant under O. 21, R. 63, Civil Procedure Code, for a declaration of his right under his sale-deed, the onus of proving the fictitious or fraudulent nature of the transaction lies heavily upon the attaching decree-holder.

I.L.R. 5 Rang. 852 (P.C.) followed.

A.I.R. 1928 Mad. 1259 distinguished.

I.L.R. 7 Pat. 777 applied.

Distinction between claims dismissed after investigation on the merits, and claims dismissed as being too late, pointed out.

When a finding of fact by the Lower Appellate Court is vitiated by a wrong view of law on the question of onus of proof, the High Court will interfere and set aside that finding.

S. Nataraja Nadar for Appellant.

S. Narayana Aiyangar for Respondent.

N.S.

Ramesam and Jackson, JJ. A.S. No. 237 of 1926.
12th August, 1929.

Execution sale—Decree against Hindu father—Sale of joint family properties in execution—Quantum of intent that passes.

In a case where joint family properties are sold in execution of a decree against the father alone, if the sale certificate is ambiguous, the sons' shares also must be taken to have been sold unless it is shown specifically that the sons' shares were not put up for sale by a reference to the execution proceedings which culminated in the sale.

C. Padmanabha Aiyangar and *T. D. Srinivasachari* for Appellant.

S. T. Srinivasagopalachari and *P. K. Janakiram* for Respondent.

N.S.

Anantakrishna Aiyar, J. S.A. No. 637 of 1925.
15th August, 1929.

Limitation Act (IX of 1908), Art. 181—Mortgage by one of two undivided brothers—Suit against both brothers—Decree against executant's share—Sale of entire property in execution—Symbolical delivery—Subsequent ousting of the other brother from possession—Application by latter for possession—Limitation.

Where, in a suit on a mortgage executed by one of two undivided brothers against both of them, a decree was passed directing the sale of the mortgagor's interest alone in the property but the decree-holder brought the entire property to sale, purchased it and took symbolical delivery of the same as it was in the possession of the tenants, and subsequently the other brother whose share was not directed to be sold by the decree was dispossessed by the decree-holder purchaser and he filed an application to recover possession of it,

Held, that the sale of the entire property in execution of the decree was a nullity and it was not incumbent on the applicant who was in possession to set aside such a sale, and that the cause of action to recover possession arose to the applicant only when he was actually ousted and not on the date of the sale.

S. A. Seshadri for appellant.

T. L. Venkatrama Aiyar for respondent.

N.S.

Anantakrishna Aiyar, J. S.A. No. 614 of 1928.
15th August, 1929.

Malabar Compensation for Tenants' Improvements Act—Applicability to roadside poramboke lands.

The Malabar Compensation for Tenants' Improvements Act is applicable only to cases of agricultural land or building site and does not apply to roadside poramboke land.

50 M. 813 followed.

M. C. Stridharan for appellant.

V. P. Karunakaran Nambiar for respondent.

N.S.

Ramesam and Jackson, JJ. A.S. No. 95 of 1925.
16th August, 1929.

Mortgage—Mortgagor's interest vested in Official Assignee—Mortgagor denying execution and consideration—Execution proved—Deed containing recitals of consideration—Onus probandi.

Where the execution of a mortgage deed is duly proved, and the deed contains recitals as to consideration, the onus lies on the person denying consideration to prove that they are false and that, in fact, no consideration passed. This rule is applicable as much against the mortgagor as against his heirs and other successors-in-interest by purchase or otherwise, and more so when the mortgagee is also dead and his legal representatives seek to enforce it.

36 All. 478 followed.

Spencer, J.'s decision in *Kumarappan Chettiar* v. *Narayanan Chettiar,* (1915) 35 I.C. 455 disapproved.

Case-law reviewed.

Watrap S. Subramania Aiyar for appellant.

K. Bhashyam and *V. C. Veeraraghavan* for respondent.

S.V.V.

Sundaram Chetty, J. S A. No. 1776 of 1925.
16th August, 1929.

Agent—Executing a mortgage for larger amount than authorised—Principal appraised of it—Non-objection to the same—If implied ratification.

Where an agent does an act exceeding his authority and the principal on being appraised of the fact fails to communicate to the agent his determination not to be bound by it within a reasonable time, it must be presumed that there was implied ratification.

9 L.W. 251 and 29 M.L.J. 551 followed.

10 Bom. H.C.R. 319 distinguished.

T.M. Krishnaswami Aiyar and *K. S. Desikan* for appellant.

S. Varadachariar and *V. Balasundaram* for respondents.

S.V.V.

Anantakrishna Aiyar, J. S.A. No. 1247 of 1927.
16th August, 1929.

Evidence Act, S. 92—Evidence of facts surrounding the transaction—Admissibility of—Registration—Document undertaking to sell to any person to whom A might ask him to sell and deliver possession—If compulsorily registrable—In pari delicto *doctrine—If applicable when and not carried out.*

Where properties said to be worth Rs. 25,000 were sold for Rs. 2,000 by Ex. A and at the same time another document Ex. I was executed by which the vendee undertook to reconvey the properties to any person to whom the (vendor) might ask him to sell and deliver possession,

Held, though oral evidence of the intention of the parties was inadmissible to prove the nominal nature of the transaction, yet S. 92 did not fetter the Court's power to find the true nature of the documents in the light of all the circumstances surrounding the transaction.

47 M. 729 and 3 R. 106: 48 M.L.J. 339 (P.C.) applied.

As *expacie* there is no interest created in land under Ex. I it need not be registered.

23 L.W. 19 followed.

Regarding the plea that it was in fraud of creditors, *held,* that if the purpose of the fraud had not been effected there was no thing to prevent a plaintiff from repudiating the transaction as being benami.

24 L.W. 500 not followed on the ground that 35 C. 551 (P.C.) was not referred to therein.

S. Varadachariar and *V. Viyyanna* for appellant.

The Advocate-General and *V. Suryanarayana* for respondents.

S.V.V.

Venkatasubba Rao and *Madhavan Nair, JJ.* — C.M.A. No. 432 of 1927.

21st August, 1929.

Civil Procedure Code, O 20, R. 12—Mesne profits—Direction in decree to determine profits in execution—Validity of—Executing Court if can go into the regularity of the decree—Plaint and decree silent as regards future profits—Future profits if can be ordered in execution.

Under the Civil Procedure Code of 1908 mesne profits have to be determined in the suit itself under O. 20, Rule 12, but if a Court directs it to be determined in execution, it is only an irregular exercise of jurisdiction and the executing court cannot go behind the decree to which it is bound to give effect in execution.

31 Bom. L.R. 400 followed.

37 I.C. 997 dissented from.

Where the plaint was silent as regards future mesne profits and the decree merely granted mesne profits without negativing future mesne profits, the Court must be deemed to have meant that he should receive mesne profits down to the date of the delivery of possession, for the Court can award subsequent profits under O. 20, Rule 12 without a prayer for the same.

12 W.R. 75, 8 I.A. 197 and 53 C. 992 followed.

T. Rangachariar, V. Govindarajachari and *B. V. Ramanarasu* for appellant.

G. Lakshmanna and *Y. Suryanarayana* for respondents.

S.V.V.

Sundaram Chetty, J. S.A. No. 33 of 1926.
29th August, 1929.

Promissory note—Consideration—Past cohabitation—If a good consideration—S. 23 of Contract Act.

Where a promissory note was executed in consideration of past cohabitation with a dancing girl,

Held, the consideration being immoral under S. 23 of the Contract Act the suit on the pronote must fail and for this purpose it does not make any difference whether the connection is adulterous or not. The test to be applied for deciding if consideration is immoral is not whether it is a past transaction or one in future contemplation. Immoral consideration under S. 23 is not the same as absence of consideration.

44 Bom. 542 and 25 Bom. L.R. 252 followed.

13 M.L.J. 7 doubted and distinguished.

K. V. Srinivasa Aiyar for appellants.

Respondent did not appear.

S.V.V.

Sundaram Chetty, J. S.A. No. 2073 of 1927.
30th August, 1929.

Contract Act (IX of 1872), S. 38—Sale of goods—Goods delivered—Purchase money claimed with interest—Right to interest disputed—Interest not a term of the contract—If purchaser bound to accept goods.

In a contract for the sale of goods, the seller claimed interest on the purchase money as payable under the contract but as the buyer disputed liability to interest the seller sent the goods to the buyer with a letter reserving his right to interest.

Held, the buyer was not bound to accept the goods with the question of interest outstanding. It being found that interest was not a term of the contract, the offer cannot be said to be an unconditional offer under S. 38, Contract Act.

Cases of debtor and creditor may stand on a different footing.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for appellants.

S. T. Srinivasagopalachariar for respondents.

S.V.V.

Venkatasubba Rao and Madhavan Nair, JJ. C.M.A. No. 367 of 1928.
21st August, 1929.

Civil Procedure Code, S. 39 and Order 21, Rule 64—Decree passed by High Court—Transfer to Vellore Court for execution—Attachment by that Court—Subsequent transfer of territorial jurisdiction to Chittoor Court—Jurisdiction of latter Court to sell without a fresh attachment.

A money decree passed by the High Court on its original side was transferred to the sub-Court of Vellore for execution and properties of the judgment-debtor were attached by the Vellore Court. Subsequently, the territorial jurisdiction was transferred from the Vellore Court to the sub-Court of Chittoor. The decree-holder applied to the Vellore Court to return the decree back to the High Court and he then applied to the High Court to transfer the decree to the Chittoor Court. After the transfer, he applied to the Chittoor Court for sale of properties. Objection was raised that the Chittoor Court had no jurisdiction to sell without attaching the properties over again on the ground that the attachment effected by the Vellore Court ceased with the extinction of its territorial jurisdiction.

Held that, as the Vellore Court would be entitled to entertain applications in execution even after the transfer of jurisdiction and, the attachment effected by it did not terminate on the transfer of jurisdiction and that, therefore, the Chittoor Court was competent to order sale of the properties without a fresh attachment.

Held also, that the provisions of Order 21, Rule 64 of the Civil Procedure Code are not exhaustive of all the cases relating to sale of property by Court.

D. Ramaswami Aiyangar for *C. S. Venkatachari* for Appellant.

A. C. Sampath Aiyangar and *T. R. Srinivasa Aiyar* for Respondent.

N.S.

Kumaraswami Sastri and Walsh, JJ. C.M.Ps. Nos. 1194, 1259 and 2016 of 1929.
23rd August, 1929.

Consolidation—Appeal and revision—Power of Court.

The following question has been referred to a Full Bench:—Whether the Court has inherent jurisdiction to consolidate appeals preferred against one judgment which will result in Court-fee being payable on the consolidated value of all the appeals and one vakalat being filed in all the appeals, and to consolidate Civil Revision Petitions for purposes of vakalat and process fee.

N R C

T. M. Krishnaswami Aiyar for *Advocate-General, M. Venkatasubbiah, K. Bhashyam Aiyangar* and *R. Sundaralingam* for Petitioners.

The Government Pleader for the Crown.

N.S.

Venkatasubba Rao and Madhavan Nair, JJ. C.M.A. No. 237 of 1929.
23rd August, 1929.

Indian Companies Act, Ss. 3 (3), 199, 200 *and* 201—*Order of High Court directing payment of unpaid share moneys to the liquidator by the share-holders—Executability of the Order by the District Court in the mofussil—Objection to the jurisdiction of the mofussil Court taken early—Effect.*

The Court contemplated by section 200 of the Indian Companies Act is the Court which would have jurisdiction if the registered office of the company were within the jurisdiction of that Court and consequently, in the case of an order passed by the High Court of Madras the Court contemplated by section 200 is not the District Court of any mofussil station but only the High Court as no other Court except the High Court has been constituted competent to deal with company matters in the Madras Presidency. Therefore, an order of the High Court of Madras, directing payment of unpaid share moneys by a share-holder to the liquidator of a company cannot be executed by a mofussil Court.

The provisions of section 3 (3) of the Act are not applicable where the objection to the jurisdiction of the Court was taken at the very outset.

N. Suryanarayana for Appellant.

C. S. Venkatachari for Respondent.

N.S.

Ananthakrishna Aiyar, J. S.A. No. 10 of 1926.
27th August, 1929.

Civil Procedure Code, S. 73—Amount realised by Receiver appointed in execution proceedings—If liable to rateable distribution.

A Receiver appointed in execution proceedings is not the agent of the decree-holder and moneys realised by him are not moneys of that decree-holder. Consequently, moneys realised by him are liable to rateable distribution under section 73 of the Civil Procedure Code.

K. Bhashyam Aiyangar for Appellant.

K. V. Ramachandra Aiyar and *N. S. Srinivasa Aiyar* for Respondent.

N.S.

Sundaram Chetty, J. S.A. Nos. 77 and 78 of 1926.
2nd September, 1929.

Company—Prospectus—Board of directors notified—Personnel charged by two directors retiring before allotment—Retirement not notified to applicants—Duty of promoters—Applicant if can rescind allotment and claim a refund.

Where relying on the personnel of the directors as notified in the prospectus, a person applied for shares and paid for them, but before the allotment the directorate had changed by two of the directors relating and that fact was not notified to the applicant,

Held, that, it was the duty of the promoters to communicate to the applicants the change in the directorate and ask them if they would adhere to their original offer or withdraw it; and if an application is made on the faith of a statement which is true when made but untrue when the shares are allotted, the applicants are entitled to rescind the offer.

17 Ch.D. 373 and 95 L.T. 756 followed.

G. Lakshmanna for Appellants.

Respondents not represented.

S.V.V.

Ramesam and Jackson JJ. A.S. No. 118 and 119 of 1927.
2nd September, 1929.

Land Acquisition—Market value of land—Special value by reason of views of local owners—If courts could consider.

If lands have a certain market value on account of the greater demand for them among the people near the locality, such a thing cannot be ignored, but must be considered. Arguments based on the return which investments in Government securities may fetch are not helpful.

The Government Pleader (*P. Venkataramana Rao*), and *C. V. Harihara Iyer* for Appellants.

S. Varadachariar and *K. P. Ramakrishna Iyer* for Respondents.

S.V.V.

Sundaram Chetty, J. S.A. No. 64 of 1926.
3rd September, 1929.

Mutt—Matadhipathi—Permanent lease by—Validity of—If grantor can himself question.

A matadhipathi granted a permanent lease of a land forming part of the general endowments of the mutt for purposes neither beneficial nor necessary to the mutt.

Held.—A matadhipathi is not a mere trustee, but has an estate for life in the permanent endowments of the mutt and an absolute property in the income derived from offerings subject to the burden

of maintaining the institution. A permanent lease granted by him will therefore be good for his lifetime. But as regards any property shown to be vested in him on specific trust for a specific purpose, he would only be a mere trustee and as such an absolute sale or a permanent lease created by him would be void.

T. V. Ramanatha Iyer assisted by *S. Sitaraman* and *S. Rajaraman* for Appellants.

V. Balasundaram Iyer for Respondent.

S.V.V.

Ramesam and Jackson, JJ. A.S. No. 116 of 1925.

3rd September, 1929.

Nattukottai Chetty—Money received by—Unconditional undertaking to pay—If can be treated as a deposit—Time taken in proceedings to declare the instrument invalid—If can be excluded.

Where an instrument contains an unconditional undertaking to pay, S. 91, Evidence Act, precludes the addition of any words like 'on demand' to the instrument and there is no presumption of 'deposit' from the mere fact that the money was left with a Nattukottai Chetti.

10 L.W. 67, distinguished.

Time taken by proceedings to declare the instrument void as having been brought about by coercion cannot be deducted under S. 14 of the Limitation Act, 1908; in respect of a suit to recover the money.

21 L.W. 916 and 50 Mad. 417, followed.

F. S. Vas for Appellant.

S. Varadachariar and *K. R. Rama Ayyar* for Respondents.

S.V.V.

Ramesam and Jackson, JJ. C.M.P. Nos. 1674 and 1676 of 1928.
30th August, 1929.

Civil Procedure Code, S. 110—*Leave to appeal to Privy Council —Reversioner's suit to set aside alienations—Appeal by reversioner against items dismissed—Cross-objections by alienees—Appeal dismissed, cross-objections allowed—One decree drawn up—If reversing judgment.*

Where the High Court dismissed the reversioner's appeal to set aside certain alienations and allowed the aliener's memorandum of objections regarding other alienations, the High Court's decree can be said to be reversing only as far as the objections allowed are concerned and not with regard to the appeal dismissed as each alienation is a distinct matter by itself.

56 M.L.J. 476 distinguished.

51 Cal. 969 (P.C.) referred to.

P. Satyanarayana Rao for Petitioners.

Ch. Raghava Rao for Respondents.

S.V.V.

Ananthakrishna Aiyar, J. S.A. No. 20 of 1926.
2nd September, 1929.

Evidence Act, S. 116—*Suit in ejectment—Defendant's title not proved—Defendant's father tenant of plaintiff—Effect.*

In a suit in ejectment, it was found that the defendant's father, had taken a lease-deed from the plaintiff agreeing to surrender possession of the leased property after the expiry of the lease.

Held that, though the admission in the lease that the plaintiff had title might not by itself confer title on the plaintiff, the defendant was estopped from questioning the title of the plaintiff without surrendering possession of the property and as the defendant had not proved any title to the property in himself, the plaintiff was bound to succeed on his possessory title.

S. Panchapakesa Sastri and *S. V. Narayana Aiyar* for Appellant.

K. Rajah Aiyar for *K. Bhashyam Aiyangar* and *J. R. Gundappa Rao* for Respondent.

S.V.V.

Sundaram Chetty, J. S.A. No. 309 of 1926.
3rd September, 1929.

Religious Endowment—Temple trustee—Agent of borrowing money without necessity but applying the funds for the temple—Decree against temple property, if to be given.

Where in a suit on a promissory note executed by the agent of a temple trustee, it was found that the money borrowed was applied for temple purposes, but it was not established that there was any "financial necessity" for the temple to borrow:

Held, that no decree could be passed against the assets of the temple.

21 M.L.J. 129 referred to.

T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for Appellant.

Watrap S. Subramania Aiyar for Respondent.

P.R.N.

Venkatasubba Rao and Madhavan Nair, JJ.
4th September, 1929.

L.P.A. Nos. 255 to 258 of 1925.

Interest—Rent—Arrears of—Interest on arrears if can be claimed—Charge created on land—If makes any difference—Interest Act XXXII of 1839.

Where no definite period is fixed for payment of the rent and the rent also varies with the extent of the land cultivated and the cess paid, no interest can be awarded under the Interest Act. Nor can interest be awarded on equitable grounds. The test for determining whether interest can be awarded on equitable grounds is "whether a Court of equity would ordinarily award interest in such cases."

42 Mad. 661 and cases following it doubted.

Interest cannot be awarded under S. 73, Ill. (*n*) to the Contract Act either.

20 Mad. 481 followed.

But if rent is charged on the land, then although nothing is said in the contract as to interest, interest is awardable.

(1903) 1 Ch. 781 followed.

B. Sitarama Rao and *P. S. Narayanaswami Aiyar* for Appellants.

T. R. Venkatarama Sastri and *T. B. Balagopalan* for Respondents.

S.V.V.

Sundaram Chetty, J.
4th September, 1929.

S.A. No. 320 of 1926.

Lessor and Lessee—Lease for one year—Unregistered—Enhanced rent fixed in the event of lessee's overstay beyond time of lease—Admissibility to prove enhanced rent—Court's power to grant.

Where a lease of immoveable property (shop) was unregistered, it cannot be admitted to show a stipulation for enhanced rent in the event of lessee's overstay. But as by non-delivery of possession, the lessee commits a breach of the contract to deliver, the Court can award a reasonable compensation under sections 73 and

74 of the Contract Act for any loss caused to the lessor by such breach.

S. T. Srinivasagopalachari for Appellant.

C. V. Subramania Aiyar for Respondent.

S.V.V.

Venkatasubba Rao and Madhavan Nair, JJ. C.M.A. No. 273 of 1929.
4th September, 1929.

Election—Revising Board—Personal interest of a member of, against a voter—If disqualifies him from considering the voter's qualifications—Submission to jurisdiction—Effect of—Two members delivering judgment in the absence of the third—Regularity of.

Where the Chairman of an Electoral Revising Board is in such a position that personal interest against a voter whose qualification to vote is in question can be assumed, then he ought not to take part in the decision or sit upon the tribunal deciding the particular voter's case.

(1926) A.C. 581 followed.

But if the voter being aware of such bias or personal interest stands by and takes the chance of a decision in his favour, he cannot afterwards object to the constitution of the tribunal when he finds his expectations are going to be frustrated.

Two of the members of the Board had written their judgments and delivered them in open Court in the absence of the third who desired to hear the applicant further. The third member subsequently heard him and differed from the other two.

Held, it was not a valid judgment, every judicial act done by several Judges ought to be completed in the presence of all of them and after deliberate joint discussion and more so when there is difference between the Judges.

6 All. 468 referred to and followed.

T. Rangachariar and *A. Srirangachariar* for Appellant.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Respondent.

S.V.V.

Wallace and Jackson, JJ. A.S. No. 142 of 1925.
6th September, 1929.

Custom—Nattukattai Chetties—Sridhanam of a woman—Death of her issue without issue—Whether devolves on her father—Custom, if can be extended by parity of reasoning or supplemented by Hindu Law.

A custom to the effect that amongst Nattukōttai Chetties the stridhanam property of a woman devolves on her father not only when she dies without issue, but even on the death of such issue.

without issue, held not proved. It is not sufficient for this purpose merely to prove a custom in respect of the first step, *viz.*, that if a woman dies without issue, her stridhanam devolves on her father and his heirs and not on her husband or his heirs.

A custom in derogation of Hindu Law must be clearly proved and cannot by mere parity of reasoning be extended beyond the actual usage proved.

37 Cal. 322 referred to.

Also, either the custom pleaded must be relied on or the general law as such. It is not open to a party to take in custom to a certain extent and seek to supplement it by incidents derived from the Hindu Law.

Observations on the vagueness and uncertainty of the conception of "stridhanam" as disclosed by the evidence in the case.

S. Varadachariar for *K. S. Champakesa Aiyangar* for Appellant.

M. Patanjali Sastri and *K. Ramanathan Chettiar* for Respondent.

S.V.V.

Anantakrishna Aiyar, J. S.A. No. 1464 of 1927.
10th September, 1929.

Civil Procedure Code—Common judgment in two connected suits—Evidence common to both—Separate decrees drawn up—Appeal against only one decree—If the other decree becomes final and precludes the Appellate Court from trying the appeal.

When two connected suits are tried together, evidence being by consent common to both and two decrees are drawn up but an appeal is preferred against only one of the decrees, the decree unappealed does not operate as *res judicata* so as to render the appeal infructuous. The Appellate Court may regularise it by insisting on the appellant amending his memorandum of appeal so as to make it an appeal against both the decrees or may require him to fill a separate appeal and excuse the delay.

29 M. 333 is not overruled by 46 M. 895 (P.C.).

L.P.A. No. 60 of 1923 followed and 43 M. 550 referred to.

A case of acquisition by a mortgagee in possession of the equity of redemption in the mortgaged properties by adverse possession should be specifically alleged and strictly proved.

37 M. 545 and 44 M. 253 distinguished.

V. Govindarajachari for Appellant.

B. Somayya for *Advocate-General* and *M. Venkatasubbiah* for Respondent.

S.V.V.

The Chief Justice and Cornish, J. L.P.A. No. 132 of 1925.
10th September, 1929.

Limitation Act, Art. 143—*Lease—Alienation in contravention of the terms of it—Suit for recovery of possession by lessor against alienees—Limitation.*

A suit by the lessor to recover possession of the leased properties against the alienee from the lessee on the ground that the alienation is in contravention of the terms of the lease-deed is governed by Art. 143 of the Limitation Act.

15 M. 123: 38 M.L.J. 275 followed.

B Sitarama Row and *P. S. Narayanaswami Aiyar* for Appellant.

K. Kutti Krishna Menon and *P. S. Ramachandra Aiyar* for Respondent.

S.V.V.

Sundaram Chetty, J. S.A. No. 30 of 1926.
10th September, 1929.

Pleading—Variation between pleading and proof—Plaintiff claiming a large relief—Facts found entitling him to lesser relief—Plaintiff consistently denying the true facts—Of relief can be granted on basis thereof.

In a suit on a contract, the plaintiff persistently denied the defendant's case which would entitle the plaintiff only to a lesser relief than prayed for. The Court found the defendant's version to be true.

Held, the Court, as a Court of Law and equity would be justified in granting a lesser relief to the plaintiff on what is found to be the true facts despite the plaintiff's denial.

23 W.R. 369: 28 A. 482; 30 M.L.J. 444 followed.

The test in such cases is whether the defendant will be taken by surprise if relief is granted on the facts established by the evidence.

50 C. 292 followed.

C. Rama Rao for Appellant.

G. Lakshmanna for Respondent.

S.V.V.

Ananthakrishna Aiyar, J. S.A. No. 1464 of 1927.
11th September, 1929.

Res judicata—*Connected suits having same parties and subject-matter—Appeal from decree in one—Decree in unappealed suit, if bars appeal.*

When there are two connected suits involving the same subject-matter, and the defeated party files an appeal against the decree

in one of them, but fails to appeal against the decree in the other, the parties to the appeal being also parties to the connected suit, the omission to file an appeal against the connected suit does not bar the bearing of the appeal. Procedure in such cases pointed out.

V. Govindarajachari for Appellant.

The Advocate-General for Respondent.

P.R.N.

Ramesam and Jackson, JJ. A.S. Nos. 127 of 1926 and 60 of 1928.
12*th September,* 1929.

Trust—Suit for accounts against a co-trustee—No specific breach of trust or threatened breach of trust proved—If suit maintainable.

Where there is no proof or allegation of any specific breach of trust or threatened breach of trust on the part of the couralars so as to justify an apprehension on the part of the plaintiffs that they would also be held liable for the breach on the ground that they did not take proper action against their co-trustee, a suit to render an account of their management is not maintainable.

103 I.C. 225 followed.

45 M. 113 distinguished.

The same rule applies to public trusts also.

K. P. M. Menon and *K. Kutti Krishna Menon* for Appellant.

The Advocate-General for *P. Govinda Menon* for Respondents.

S.V.V.

Kumaraswami Sastri and Walsh, JJ. A.S. No. 418 of 1924.
13*th September,* 1929.

Civil Procedure Code, S. 92*—Scheme suit—Sanction accorded to three persons—Two alone suing—Suit if maintainable—Reliefs other than for mere scheme—If can be asked for.*

Three persons as persons interested in the affairs of a temple applied to the Advocate-General for sanction and obtained it *ex parte* without notice to the trustees, the relief prayed for being a scheme on the ground of the mis-management of the trustees. The suit was later instituted by only two of them, the third being made a party defendant and claimed also other reliefs.

Held that, a suit by some only of the persons to whom sanction was given would not lie because the sanctioning authority might have been influenced in granting the sanction by the status, solvency, etc., of the omitted person and it may well be that the sanction might not have been given but for such person's association.

29 M.L.J. 231; 38 M. 1192 followed.

Cases of suits by trustees stand on a different footing as it is the trust which has then the right of action and is the plaintiff. Even then if the act which gives rise to the cause of action is an act which has to be done by all the trustees together or in consultation with each other, a suit filed without consulting the others or by simply joining the others as defendants will be bad.

Also cases which hold that after the suit, if one of the persons die, there is no abatement do not apply as the suit has been *rightly instituted* and the Court gets seisin of the case.

Although sanction obtained *ex parte* is not invalid, it would be desirable to give notice before giving sanction. It is not competent to the Court to enlarge the scope of the suit and grant reliefs other than those included in the sanction.

11 M. 148; 21 Bom. 257 followed.

Advocate-General and *P. V. Vallabhacharyulu* for Appellants.

S. Varadachariar and *V. Govindarajachari* for Respondents.

S.V.V.

Venkatasubba Rao and Madhavan Nair, JJ.
13th September, 1929.

C.M.A. No. 288 of 1927.

Civil Procedure Code, O. 22, R. 4—Mortgage decree—Death of a party after preliminary decree—Two legal representatives already on record—No petition to add L.R. put in—Final decree passed and sale thereon—One L.R. omitted and not a party—Of sale binding on him.

A suit was filed on a mortgage against a father, mother and son, parties being Mahomedans. After the preliminary decree, the son died and his legal representatives were the father, widow, and an infant son. The first two were already parties. The infant son was not made a party to the suit and a final decree was passed. Sale followed and the son impugned the final decree and sale as not binding on him.

Held that, though the representation may be incomplete, it was sufficient and in the absence of any fraud or collusion, the decree bound the estate in the hands of the infant son as well.

32 C. 296 (P C.); 26 M. 230: 33 M. 6; 47 A. 466 followed.

38 M. 682; 50 M.L.J. 232; 53 C. 166 distinguished on the ground that the decree in those cases was void and a nullity.

The question as to what the result would be if the son had died before the passing of the preliminary decree left open, Venkatasubba Rao, J., doubting if even then O. 22, R. 4 will apply.

B. Sitarama Rao for Appellant.

P. Govinda Menon for Respondent.

S.V.V.

Waller, J. I.P. No. 328 of 1926.
13*th September*, 1929.

Insolvency—Adjudication by foreign Court—Effect—Properties in British India, if vest in the Official Assignee—Rights of execution creditor in British India.

Where a person was adjudicated an insolvent by the Supreme Court of Singapore, another person obtained an *ex parte* decree against the insolvent in British India and attached his immoveable properties. The Official Assignee of Singapore obtained an order of request from the Colonial Court to the Insolvency Court in India to act in aid of the Colonial insolvency and applied in the British Indian Court for stay of further execution by way of sale on the ground that no execution, unless completed by sale, could be effective against him.

Held, that the adjudication in the foreign Court of Singapore did not have the effect of vesting the immoveable properties of the insolvent in British India in the Official Assignee of Singapore and the execution proceedings must proceed.

1910 A.C. 508 followed.

V. Varadaraja Mudaliar for Official Assignee.

V. K. Srinivasa Aiyangar and *T. K. Rangasami* for Attaching Creditor.

N.S.

Ramesam, J. C.R.P. No. 899 of 1929.
17*th September*, 1929.

Madras Civil Rules of Practice, Chap. X, R. 30—Filing of fee certificate—Actual payment whether always necessary—Adjustment or receipt of promissory note—Validity.

There may be cases in which the fee due to a vakil may be adjusted otherwise than by actual payment of money. Such an adjustment, however, must be something more than a mere agreement to pay. When a promissory note is given to a vakil it may be equivalent to payment of money. It is doubtful if note (*ii*) to R. 30 of Chap. X of the Civil Rules of Practice is correct.

T. R. Venkatarama Sastri and *B. V. Viswanatha Aiyar* for Petitioner.

The Advocate-General amicus curiæ.

N.S.

Anantakrishna Aiyar, J.
17th September, 1929.

S.A. No. 1088 of 1921.

Madras Estates Land Act, S. 8, *Exception—Agraharam held to be estate by Privy Council—Subsequent suit respecting other lands in—Jurisdiction of Civil Court—Plea of acquisition of kudivaram by Agraharamdars—Sustainability.*

In a suit instituted for arrears of rent by an Agraharamdar of Arepalli, the defendants pleaded want of jurisdiction in a Civil Court because the Agraharam of Arepalli is an "estate" within the meaning of the Madras Estates Land Act.

The Privy Council on appeal from suits relating to certain other lands situate in the same Agraharam as per decision reported in 52 Mad. 453, held on a construction of the grant that Arepalli Agraharam is an "estate" within the meaning of S. 3, cl. (2) (*d*).

Held, consequent upon the Privy Council decision, it was still open to the parties in the present appeal to show "whether the Agraharamdars acquired kudivaram interest subsequently to the grant in individual holdings, so as to bring it within the meaning of exception to section 8," though in those cases the Privy Council directed the return of plaints for presentation to the proper Court in view of admissions made in the course of and for the purpose of those proceedings that the Agraharamdars did not acquire the kudivaram interest subsequently.

P. Satyanarayana Rao for Appellant.

G. Lakshmanna for Respondent.

P.R.N.

Curgenven, J.
18th September, 1929.

C.R.P. No. 169 of 1929.

Civil Procedure Code, S. 115—*Election cases—Revision.*

The High Court will not interfere in revision in election cases, except where a real question of jurisdiction is involved.

(1927) M.W.N. 842 (F.B.) referred to.

P. Venkataramana Rao for Petitioner.

S. Parthasarathy and *V. K. Thiruvenkatachari* for Respondent.

N.S.

Anantakrishna Aiyar, J.
18th September, 1929.

S.A. No. 467 of 1928.

Abkari Act—Partnership relating to Abkari business—Validity.

A partnership relating to Abkari contract is not invalid except where it involves a transfer of the business.

A. Visvanatha Aiyar and *A. Ramaswami Aiyar* for Appellant.

A. C. Sampath Aiyangar and *T. R. Srinivasan* for Respondent.

N.S.

N.R.C.

Anantakrishna Aiyar, J. S.A. No. 31 of 1928.
19th September, 1929.

Madras Estates Land Act, S. 59—*Commutation of varam into cash rent—Stipulation for payment of interest—If amount to enhancement of rent.*

Where varam rent was commuted into cash rent payable in instalments and the patta contained a stipulation for payment of interest on overdue instalments,

Held, that the stipulation for payment of interest did not amount to an enhancement of rent.

V. Govindarajachari for Appellant.

Y. Suryanarayana for Respondent.

N.S.

Wallace, J. S.A. No. 88 of 1926.
19th September, 1929.

Madras Local Boards Act (XIV of 1920), *Ss.* 60 *and* 237—*Union Board—Constitution of—Suit by Board before its due constitution claiming a site as part of public street—Maintainability—Right of Taluk Board to maintain such a suit.*

Where a Survey Officer made an order that a site was not a part of public street, and a Union Board brought a suit for setting aside that order, but the Union Board had not been duly constituted under a Government notification as required by the Madras Local Boards Act of 1920 on the date of the suit,

Held, that the suit was not maintainable, even though such a Government notification was issued subsequent to the institution of the suit and before the trial.

Held, further, that, as the right to maintain suits in respect of public streets which vested in the Taluk Board under the old Act passed to the same Taluk Board under S. 237 of the new Act, only the Taluk Board could maintain the action in the absence of any Government notification divesting that right from that Taluk Board on the date of the suit.

K. Bhashyam and *T. R. Srinivasan* for Appellant.

K. V. Krishnaswami Aiyar, V. Rajagopalier and *T. V. Ramiah* for Respondent.

N.S.

Anantakrishna Aiyar, J. S.A. No. 249 of 1926.
26th September, 1929.

Presumption—Person entitled to a share in property—Part of it held in absolute right and part in qualified right—Sale of part of it—Identification not possible—Presumption to be drawn in such cases.

Where a person has in his hands properties, over some of which he has an absolute right and over others a limited right, and sells a

portion of the properties to a third person, without stating which of those he is selling, and where it is not possible to identify the properties he is absolutely entitled to, the Court can assume that he sold the property over which he had an absolute right.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Appellants.

S. Varadachariar and *S. V. Venugopalachariar* for Respondents.

N.S.

Kumaraswami Sastri and Walsh, JJ. Appeal No. 406 of 1924.
3rd October, 1929.

Compromise decree—Clause having the effect of operating as a clog on the equity of redemption—Validity.

A clause having the effect of operating as a clog on the equity of redemption can be relieved against even though it is found in a compromise decree, as such a decree has no higher legal effect than a contract between the parties.

T. Rangachariar and *B. Sitarama Rao* for Appellant.

The Advocate-General and *P. Govinda Menon* for Respondent.

N.S.

Curgenven, J. C.R.P. No. 1607 of 1927.
3rd October, 1929.

Civil Procedure Code, O. 1, *R.* 10*—Plaint as filed beyond the jurisdiction of the Court—If and when Court can transpose.*

An assignee from a landlord sued to eject a prior lessee as holding over after the expiry of his lease and paid Court-fee as on one year's rental. On objection being taken as to jurisdiction the Court heard arguments on that issue and presumably made up its mind. But then at the instance of the plaintiff, the landlord (who was a defendant) was transposed to bring the case under S. 7, cl. (11).

Held, as the suit as laid was beyond the jurisdiction of the Court and the Court had on hearing arguments presumably felt it so, the Court cannot transpose, but must have returned the plaint.

41 Mad. 701 followed.

P. Satyanarayana Rao for Petitioner.

S. V. Venugopalachari for Respondent.

N.S.

Madhavan Nair and Cornish, JJ. C.R.P. No. 1357 of 1927.
4th October, 1929.

Legal Practitioners Act, S. 28*—Pleader—Oral agreement to pay fees—Suit for recovery of—Maintainability.*

An oral agreement by a client to pay fees to a pleader is void and unsustainable under S. 28 of the Legal Practitioners Act. In such a case the principle of *quantum meruit* does not apply.

27 Mad. 512 and 27 M.L.J. 278 referred to and explained.

S. Rangaswami for *B. Venkatraman* for Petitioner.

S. Rangachari for Respondent.

N.S.

Anantakrishna Aiyar, J. S.A. No. 60 of 1926.
7th October, 1929.

Hindu Law—Father—Mortgage providing for simple interest and enhanced compound interest on default—Settlement of amount by remitting some amount out of the total amount—Subsequent mortgage for the amount settled on all the properties except one item released—Settlement, if binding on sons—Penalty—Award of reasonable compensation—Award of lump amount arbitrarily—Propriety—Suit by mortgagee—Decree for a less amount—Costs—Proper order.

A Hindu father executed a mortgage providing for simple interest at 15 per cent. per annum and in default for compound interest at 18 per cent. per annum from date of default, in settlement of a prior hypothecation which provided for 12 per cent. simple interest and in default 15 per cent. compound interest. The principal amount for the later mortgage was arrived at by calculating the penal enhanced compound interest at 15 per cent. and by remitting from the total sum a small amount. Also one of the properties comprised in the original mortgage was released in the later mortgage.

Held (in a suit on the later mortgage):

(1) that, though the original bond provided for penal rate of interest, the settlement was binding on the sons and could not be re-opened, as the settlement was arrived at in consideration of the release of one of the properties and the remission of a certain amount;

(2) that, in cases of penalty, reasonable compensation which is awarded must be on some legal principle and must not be fixed arbitrarily at a certain amount; and

(3) that, the principle that a mortgagee is entitled to his costs is applicable only when he is a defendant, but, when as plaintiff he makes a claim for a large sum and gets a decree for a less amount, he can get costs only on the sum allowed and must pay costs on the sum disallowed.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for Respondent.

N.S.

Jackson, J. C.R.P. No. 959 of 1928.
7th October, 1929.

Civil Procedure Code, O. 7, Rr. 10 *and* 11—*Suit for possession of immoveable property—Undervaluation—Correct valuation rendering Court incompetent to entertain suit—Procedure to be followed.*

Where a suit for recovery of possession of immoveable property was undervalued and the Court before which it was filed found, after investigation, that the correct valuation would render it incompetent to entertain the suit,

Held, that the proper order to be passed by the Court was to return the plaint for presentation to the proper Court under O. 7, R. 10 and not to ask the plaintiff to pay deficient Court-fees and, on failure to pay the same, to reject the plaint under R. 11.

41 M. 701 referred to.

R. Kesava Aiyangar for Petitioner.

V. Rajagopala Aiyar and *T. V. Ramiah* for Respondent.

N.S.

Cornish, J. C.R.P. No. 553 of 1927.
8th October, 1929.

Negotiable Instrument—Endorsement—Suit by endorsee of pronote—Finding that endorsee abstracted the pronote from endorsor—Maintainability of suit.

Where, in a suit by the endorsee of a promissory note, it was found that the endorsee had abstracted the pronote from the custody of the endorsor, the endorsement does not vest any title in the endorsee as the endorsement was not followed by delivery with intent to pass title, and consequently, the suit is not maintainable.

P. J. Kuppanna Rao for Petitioner.

S. R. Muthuswami Aiyar for Respondent.

N.S.

Wallace, J. S.A. No. 1884 of 1926.
9th October, 1929.

Limitation Act, Art. 181—*Mortgage suit—Application to pass a final decree—Limitation—Commencement of.*

Where a preliminary decree in a mortgage suit was confirmed in Second Appeal by the High Court on the ground that there was no point of law for Second Appeal, the commencement of limitation for an application to pass a final decree is from the date of the High Court decree and not the Trial Court decree.

46 Cal. 620 (P.C.) distinguished.

B. Sitarama Rao and *C. V. Harihara Aiyar* for Appellant.

S. A. Seshadri for Respondent.

N.S.

Cornish, J. C.R.P. No. 466 of 1927.
9th October, 1929.

Civil Procedure Code, S. 115—*Other remedy open—Interference in revision.*

Where an application under S. 41, cl. (3) of the Guardian and Wards Act by the ward, after attaining age, against the guardian to render accounts was dismissed by the District Court except as regards the account books and admitted cash in his possession which were ordered to be put into Court,

Held (on revision), that no revision lay as a remedy by suit was available.

33 Bom. 419, 7 I.C. 214 and 34 Cal. 211 followed.

K. Rajah Aiyar and *V. Ramasami Aiyar* for Petitioner.

S. R. Muthusami Aiyar for Respondent.

N.S.

Anantakrishna Aiyar, J. S.A. No. 449 of 1926.
11th October, 1929.

Hindu Law—Maintenance of widow—If private properties of the widow to be taken into consideration in fixing the quantum.

Where a widow in possession of productive private properties claimed maintenance from her co-widow and her son, etc., and the income of the properties was enough to support the family and possibly even more,

Held, the right to maintenance is an absolute right and does not depend on the necessity arising from want of other means to support themselves and as such though the possession of means may be a factor to be considered when her husband's family is not possessed of sufficient properties, it cannot be taken into consideration when the properties are more than enough.

38 M. 153 explained.

Analogy of 4 M. 171 applied.

Unless the claim for maintenance is exorbitant, the Court ought not to disallow costs to the widow or allow the defendant proportionate costs on the amount disallowed.

21 M.L.J. 706 followed.

R. Ramamurti for *M. Venkatasubbiah* for Appellant.

B. Somayya for Respondent.

S.V.V.

Curgenven, J. C.R.P. No. 243 of 1928.
3rd October, 1929.

Civil Procedure Code, O. 47, Rr. 1 *and* 2—*"Clerical or arithmetical mistake or error apparent on the face of the decree"—If means the same thing as "mistake or error apparent on the face of the record" in R.* 1—*Decree in conformity with judgment—Prior to review under R.* 2.

Where in a suit for dessolution of partnership costs were awarded personally against defendants 4 to 6 of whom some were minors, and the decree was in conformity with the judgment, and subsequently an application for review was made to the succeessor of the Judge, who passed the decree, on the ground of error apparent on the face of the record,

Held, that the application could be made only on the ground that there was "a clerical or arithmetical mistake or error apparent on the face of the decree." Rule 2 of Order 47, Civil Procedure Code. This phrase under this rule cannot be construed to mean "mistake or *an error* apparent on the face of the decree" as in Rule 1.

24 L.W. 447 referred to and followed.

S. Panchapakesa Sastri for *C. Krishnamachari* for Petitioner.

K. Bhashyam Aiyangar and *T. D. Srinivasachari* for Respondent.

N.S.

Kumaraswami Sastri, Curgenven and Walsh, JJ. *In the matter of* a First Grade Pleader.
7th October, 1929.

Legal Practitioners Act, S. 13 (*b*)—*Legal practitioner taking money from client for filing suit and failing to do so, but intimating to client that suit was filed.*

Where a legal practitioner was paid money and stamps by a client for instituting a suit for recovery of a house, but never filed the same, though he, on several occasions, wrote to the party stating that suit was filed and giving the date of hearing of the suit and pleaded as a justification that he wrote the letters to client to pacify her on instructions from her friend who was helping her:

Held, that the pleader was guilty of unprofessional conduct within the meaning of S. 13 (*b*) of the Legal Practitioners Act.

The Advocate-General for The Bar.

T. M. Krishnaswami Aiyar and *M. S. Venkatarama Aiyar* for Pleader.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. O.P. Nos. 169 & 170 of 1929.
11th October, 1929.

Income-tax Act, S. 4 (2)—*Partner having sharers in Indian and Foreign firms—Sums due by Foreign firm to Indian firm—*

Remittance by former to Indian firm—Drawings by partner, out of—If taxable.

Where a partner owned shares in two firms one in India and another outside India and the latter owed moneys to the Indian firm and sent sums to the Indian firm towards the said debt and the debt was discharged leaving a margin, and the partner drew sums from the Indian firm.

Held, that such drawings cannot be assessed to income-tax under S. 4 (2) of the Act, but that the amounts remitted to the firm could be assessed only on the firm.

Held further, that a letter written by the partner from India to the Foreign firm asking the firm to send profits to India or to credit them in the accounts did not constitute sufficient evidence that the amounts remitted were profits taxable under S. 4 (2) of the Act.

M. Patanjali Sastri for The Commissioner of Income-tax.

K. S. Krishnaswami Aiyangar and *R. Kesava Aiyangar* for Assessee.

P.R.N.

Ramesam and Cornish, JJ. O.S.A. Nos. 75 and 79 of 1929.
16th October, 1929.

Presidency Towns Insolvency Act, Sch. II, Rr. 18, 19 *and* 20—*Scope of—Sale by Court and sale under orders of Court—Power of Court to confirm the sale and direct possession to be given.*

The Court, while approving of a composition by the creditors of an insolvent under which the guarantors on payment of Rs. 11,000 were given possession of all the estate of the insolvent by the mortgagee, gave liberty to sell items of property mortgaged by the insolvent. A purchaser under such sale applied to the Court for confirmation of the sale and possession from the guarantors.

Held, whether the sale is to be considered as one by the Court or one out of Court under orders of Court, under R. 18 read together with Rr. 19 and 20 of Sch. II of the Presidency Towns Insolvency Act, the Court has jurisdiction to confirm the sale and to direct possession to be given.

40 Cal. 140; 48 All. 209; 16 C.W.N. 394 considered.

S. Duraiswami Aiyar and *A. K. Ramachandra Aiyar* for Appellants.

V. V. Srinivasa Aiyangar and *V. Varadaraja Mudaliar, A. Kuppuswami Aiyar* and *M. Ramachandra Rao* for Respondents.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. O.P. No. 121 of 1929.
17th October, 1929.

Income-tax Act, Ss. 22 *and* 23—*Combined notice under* S. 22 (4) *and* 23 (2)—*Legality—Assessee failing to produce accounts—Assessment under S.* 23 (4)—*Validity.*

Where an assessee was assessed to income-tax under S. 23 (4) in consequence of his failure to produce to submit a proper return, but such assessment was on appeal cancelled by the Assistant Commissioner who directed a fresh assessment, and the Income-tax officer thereupon issued a combined notice under S. 22 (4) and S. 23 (2) calling upon the assessee to produce accounts, and the assessee failing to produce the same, the Income-tax officer assessed him to income-tax under S. 23 (4):

Held, (1) that the combined notice was valid in law;

(2) that the failure to give notice under S. 23 (2) did not preclude the Income-tax officer from assessing under S. 23 (4); and

(3) that the failure of the assessee to comply with a notice under S. 22 (4) or S. 23 (2) entailed the penalty of being assessed under S. 23 (4) on the estimate basis.

K. V. Krishnaswami Aiyar, V. Rajagopala Aiyar and *T. V. Ramiah* for Assessee.

M. Patanjali Sastri for The Commissioner of Income-tax.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. — O.P. No. 244 of 1928 and O.P. No. 16 of 1929.

18th October, 1929.

Income-tax Act, Ss. 10 (2) (*vi*) *and* 24—*Assessee having several businesses—Depreciation allowance in respect of one business—Set off against profits and gains of another business—Right to.*

Where an assessee owned a number of businesses, in one which the profits were not enough to cover the depreciation allowance in respect of machinery under S. 10 (2) (*vi*) of the Income-tax Act, and claimed to set off such excess depreciation against the profits of the other businesses:

Held, that the assessee was entitled under S. 24 of the Act to set off such loss or depreciation as against the profits arising from other businesses or other heads of income.

Held further, that the proviso to section 10 (2) (*vi*) would not prevent the assessee from treating depreciation allowance in the same way as other charges mentioned in S. 10, and that such depreciation allowance was on the same footing as expenses or charges for repairing buildings or machinery used in the business.

"Profits" in section 10 means the aggregate profits gained by the assessee from all his businesses taken together.

T. M. Krishnaswami Aiyar for *M. Subbaroya Aiyar* and *T. P. Gopalakrishna Aiyar* for Assessee.

M. Patanjali Sastri for The Commissioner of Income-tax.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. Cr. Rev. Cas. No. 941 of 1928.
22nd October, 1929.

Criminal Procedure Code, Ss. 256 *and* 257—*Applicability to security proceedings.*

Held, S. 256 of the Code of Criminal Procedure, does not apply to security proceedings and therefore a person called upon to furnish security for good behaviour is not as of right entitled to have the prosecution witnesses already examined recalled for further cross-examination. He has, however, a right under S. 257 to file a list of witnesses for further cross-examination and would be entitled to cross-examine them, if the application is not vexation.

Nugent Grant and *R. Kesava Aiyangar* for Petitioner.

N. S. Mani for *The Public Prosecutor* for The Crown.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. C.M.P. Nos. 2016 and 94 of 1929.
22nd October, 1929.

Practice—Second Appeals and Civil Revision Petitions—Consolidation of for purposes of Court-fees and Vakalats—Power of Court.

Though the High Court had inherent powers to consolidate appeals for the purpose of saving time and unnecessary expense, such power could not affect the levy of Court-fees payable to Court.

Where, therefore, a number of rent suits were disposed of by a common judgment, but separate decrees were drawn up, and appeals and civil revision petitions were filed against the decrees and it was sought to consolidate them so as to enable the filing of a single vakalat and payment of Court-fees on the consolidated amounts of the appeals and the revision petitions.

Held, that there was no power to consolidate so as to enable the party to file one single vakalat or to pay Court-fees on the consolidated value of the subject-matter only.

The Advocate-General and *M. Venkatasubbiah* for Petitioners in C.M.P. No. 2016 of 1929.

K. Bhashyam Aiyangar and *R. Sundaralingam* for Petitioners in C.M.P. No. 94 of 1929.

The Government Pleader for The Crown.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. O.P. No. 275 of 1928.
10th October, 1929.

Indian Income-tax Act—Loss of cash by theft during the course of moneylending business—Whether deductible

The following question was referred to a Full Bench:—

"Whether or not the loss of cash by theft during the course of the moneylending business of an assessee, is deductible item in the computation of the taxable income."

V. Rajagopala Aiyar and *T V. Ramiah* for Assessee.

M. Patanjali Sastri for The Commissioner of Income-tax.

N S.

Kumaraswami Sastri, Curgenven and Walsh, JJ. O.P. No. 179 of 1928.
15th October, 1929.

Income-tax Act, Ss 6 (iv) and 10—"Business"—Assessee carrying on moneylending business—Purchase of rubber plantation in lieu of debts due—Profits realised by sale of such property—Assessability to income-tax.

An assessee in the course of money dealings took an assignment from his debtor of certain rubber plantations in satisfaction of debts due to him. The purchase of the property, the income from and the expenditure in connection with the property were all entered in the accounts of the money-lending business. Later on he sold the plantations for a profit.

On a question as to whether such profits realised by the sale of the property were assessable to income-tax,

Held, that the profits realised by the sale were not casual, but profits from business and as such taxable as profits from business.

V. V. Srinivasa Aiyangar and *R. Kesava Aiyangar* for Assessee.

M. Patanjali Sastri for The Commissioner of Income-tax.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. O.P. No. 262 of 1928.
15th October, 1929.

Income-tax Act, S. 6 (iv)—Business—Property purchased by money-lender in satisfaction of debts due—If part of business—Evidence necessary.

Where the assessee who was a money-lender purchased from his debtor a rubber plantation in discharge of debts due from the debtor and the fact of the purchase alone was entered in his accounts, but neither the income from the property nor the expenses of management were entered in the accounts.

N R C

Held, that there being no legal evidence to show that the property was treated as part of the business, the profits arising from the sale of the property were not profits from business assessable to income-tax.

K. Raja Aiyar and *V. Ramaswami Aiyar* for Assessee.

M. Patanjali Sastri for The Commissioner of Income-tax.

P.R.N.

Ramesam and Cornish, JJ. O.S.A. No. 32 of 1929.
18th October, 1929.

Madras High Court Fees Rules, O. 6, R. 1, cls. (b) and (c)—"Disposed of"—Meaning of—Judgment by confession—Mode of taxation of fees.

In a mortgage suit against defendants 1 to 4, 3rd and 4th defendants remained *ex parte*, but defendants 1 and 2 contested. When the case was taken up for trial, defendants 1 and 2 withdrew the defence and submitted to a decree. The plaintiff had however to examine the 1st defendant to prove his case against the *ex parte* defendants 3 and 4.

Held, that the plaintiffs were entitled to tax the fees according to clause (*b*) of Rule 1 of Order 6 of the Fee Rules, and not under clause (*c*), there being only a judgment by confession against defendants 1 and 2. The words "disposed of" in clause (*c*) do not mean disposed of in any manner, but adjudicated on the merits.

24 L.W. 808 referred to.

S. Krishnamurthy Aiyar for Appellant.

T. D. Srinivasachari for Respondent.

N.S.

Wallace and Madhavan Nair, JJ. S.A. No. 1532 of 1925.
22nd October, 1929.

Malabar Compensation for Tenant's Improvements Act—Applicability to building leases.

Held, that the Malabar Compensation for Tenants' Improvements was not confined to agricultural holdings but applied to building leases as well and consequently a lessee under a building lease was entitled, when sought to be ejected from the plot to compensation for the building erected by him in spite of a covenant in the lease-deed for restoration of vacant possession.

P. Govinda Menon for Appellant.

B. Sitarama Rao and *C. V. Harihara Aiyar* for Respondent.

P.R.N.

Wallace, J. S.A. Nos. 469 and 470 of 1926.
22nd October, 1929.

Limitation Act—Suit for accounts and money due under a registered agreement—Plea of set off of amounts due from plaintiff—Art. 89 *or* 116 *applicable.*

By a registered agreement, the parties had agreed that each was to manage the common properties for a period of two years alternately and to account to the other for his share of the income. In a suit for accounts and for money due thereunder, the defendant pleaded a set off of the amount due to him from the plaintiff on account of the latter's management for the prior period.

Held, though a claim for money due by an agent to the principal on taking of accounts falls under Art. 89, it also falls under Art. 116 as a claim for compensation for breach of the contract in writing registered.

"Compensation" in Art. 116 is used in a wider sense than "damages."

12 Cal. 357 followed.

44 Cal. 759 (P.C.) referred to.

K. Bhashyam Aiyangar and *R. Visvanathan* for Appellant.

K. Rajah Aiyar for Respondent.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. C.R.P. Nos. 100 and 91 of 1929.
25th October, 1929.

Court Fees Act (Madras), 1922, *Sch. II, Arts.* 17, 17-A *and* 17-B*—Applicability—Madras Hindu Religious Endowments Act, S.* 84 (2)*—Application under—Court-fees.*

The Court-fee payable on an application under S. 84 (2) of the Madras Hindu Religious Endowments Act is fifteen rupees under Art. 17, Sch. II of the Madras Court Fees Act, 1922. Arts. 17-A and 17-B are not parts of Art. 17.

56 M.L.J. 113 dissented from.

56 M.L.J. 373 approved.

T. R. Ramachandra Aiyar, C. Unnikanda Menon and *K. Chandrasekara Thampan* for Petitioner in C.R.P. No. 100 of 1929.

P. Govinda Menon for Petitioner in C.R.P. No. 91 of 1929.

P. Venkataramana Rao for Respondent.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. C.M.P. Nos. 1194 and 1259 of 1929.
1st November, 1929.

Practice—Civil revision petition from common judgment—Consolidation for purposes of vakalath and process fees—Power of High Court.

Held, the High Court had no power to consolidate civil revision petitions so as to enable the petitioner to file only one vakalath in all the petitions or to pay only one set of process fees, although the petitions may be from the same judgment and against the same respondent.

R. Sundaralingam for Petitioner.

The Government Pleader for The Crown.

P.R.N.

Jackson, J. C.R.P. No. 152 of 1929.
5th November, 1929.

Legal representative—Civil Procedure Code, S. 2, cl. (11)—*Undivided brother—Proof of separate assets if necessary.*

In a suit on a pro-note, the defendant died before decree leaving behind his undivided brothers as his nearest heirs. The brothers pleaded that the deceased left no separate assets and therefore were not legal representatives.

Held, the undivided coparceners in a joint Hindu family are not lagal representatives within the meaning of S. 2 (11), Civil Procedure Code and before the section can apply, there must be proof that the deceased left an *"estate"* which she proposed L.R.'s could have taken.

S. V. Venugopalachari for Petitioner.

P. R. Srinivasan for Respondent.

S.V.V.

Kumaraswami Sastri, Curgenven and Walsh, JJ. C.M.S.A. No. 153 of 1927.
5th November, 1929.

Civil Procedure Code, O. 38, *R.* 9—*Construction—Attachment before judgment—If terminates on dismissal of suit—Order of withdrawal—If necessary.*

An attachment before judgment comes to an end on the dismissal of the suit in which it was made, although no formal order withdrawing the attachment is made, and the attachment does not receive on the reversal of the dismissal on appeal.

T. V. Muthukrishna Aiyar for Petitioner.

M. S. Vaidyanatha Aiyar for Respondent.

N.S.

Kumaraswami Sastri, Curgenven and Walsh, JJ. L.P.A. No. 117 of 1925.
5th November, 1929.

Grant—Construction—Service grant—Nankavasth—Resumability—Tests—Pre-settlement grant with rights of alienation—Onus.

Where it was found that grants were made prior to the settlement, and the grantees enjoyed the properties with all rights of alienation:

Held, that the onus was on the grantor to prove that the grants were resumable, and that the grants being grants burdened with service and not grants in lieu of wages for services, they could not be resumed.

K. Bhashyam Aiyangar for *S. Srinivasa Aiyangar* and *S. Venkatesa Aiyangar* for Appellant.

G. Lakshmanna and *P. Vedachalam* for Respondents.

S.V.V.

Venkatasubba Rao and Madhavan Nair, JJ. C.M.A. No. 134 of 1928.
6th November, 1929.

Legal Practitioners Act (XVIII of 1879), *S.* 28*—Promissory note in favour of pleader for balance of fees due—Promissory note if void.*

Where by virtue of an oral agreement between a pleader and his client, a fee of Rs. 5,000 was agreed to be paid to the pleader and subsequently a promissory note was executed for the balance of fees due then:

Held, the promissory note was not void under S. 28 of the Legal Practitioners Act. Agreements entered into and reduced to writing with regard to part of the fees are valid even though the original agreement was only oral.

A. C. Sampath Aiyangar and *T. R. Srinivasa Aiyar* for Appellant.

B. Somayya and *Kasturi Seshagiri Rao* for Respondent.

S.V.V.

Kumaraswami Sastri and Walsh, JJ. A.S. No. 439 of 1927.
7th November, 1929.

Trust—Recent dedication, nature of—Usage as the test—Founder creating trust with intention as to surplus being appropriated by his family—Validity—Ambiguity as to nature of trust—Mode of construction.

Where the temple is of comparatively recent foundation and its origin well known and where there is no deed of gift or dedication, the nature of the dedication must be determined by the

usage. There is nothing illegal in the founder having created a trust to the effect that the temple should be maintained out of the offerings and that the balance should go to his family.

Where there is an ambiguity as to the trust, the course of action can be called in aid as inferring that the persons concerned in the trust have not been committing a breach of trust from the commencement.

L.R. 4 Ch. App. 722 relied on.

K. V. Krishnaswami Aiyar and *B. V. Viswanatha Aiyar* for Appellants.

T. Rangachariar, A. Srirangachari and *S. Ramanujam* for Respondents.

N.S.

Jackson, J. C.M.S.A. No. 42 of 1926.
8th November, 1929.

Provincial Insolvency Act, S. 31—*S.* 145, *Civil Procedure Code—Surety bond executed prior to adjudication—Liability under—If a debt within the meaning of the Insolvency Act.*

The insolvent had, prior to his adjudication, executed a surety bond under S. 145, Civil Procedure Code, undertaking to pay a sum of money in the event of his failing to produce certain moveable property entrusted to his custody.

Held, the liability is a debt within the meaning of the term in the Provincial Insolvency Act and the insolvent, who obtained a general protection order could not be arrested in proceedings to enforce the surety bond.

B. Somayya and *Kasturi Seshagiri Rao* for Appellant.

T. G. Raghavachari for Respondent.

S.V.V.

Jackson, J. C.M.P. No. 3871 of 1929.
12th November, 1929.

Civil Procedure Code (*V of* 1908), *O.* 41, *R.* 5—*Appeal against order refusing to set aside an* ex parte *decree—Applications therein for stay of further proceedings in pursuance of the decree—If competent.*

Where against an order refusing to set aside an *ex parte* preliminary mortgage decree, the defendant preferred a Civil Miscellaneous Appeal in which he put in an application for stay of further proceedings and execution in pursuance of the said *ex parte* decree, and a preliminary objection was raised that such an application was incompetent in the absence of any appeal from the decree itself.

Held, that in the absence of an appeal against the *ex parte* decree itself no application for the stay of further proceedings in

pursuance of the decree can be entertained in the Civil Miscellaneous Appeal.

I.L.R. 31 Cal. 1081 followed.

T. M. Krishnaswamy Aiyar and *T. V. Balagopal* for Petitioner.

Watrap S. Subrahmania Aiyar for Respondent.

P.R.N.

The Chief Justice, Krishnan, Pandalai and Curgenven, JJ. C.R.P. Nos. 1349 and 1350 of 1928.
12th November, 1929.

Provincial Insolvency Act, Ss. 25, 27 (2), 37 *and* 43—*Scope and construction—Order of adjudication fixing time for applying for discharge—Failure to apply within—Adjudication, if annulled* ipso facto—*Power of Court to extend time after expiry—Civil Procedure Code, S.* 148.

The failure of the insolvent to apply for discharge within the period fixed by the order of adjudication does not involve the automatic annulment of the adjudication, an express order of the Court being necessary for such annulment; and the Court has jurisdiction to extend the time for discharge under S. 27 (2) of the Provincial Insolvency Act, *read* with S. 148, Civil Procedure Code, even after the expiry of the time fixed.

S. V. Venugopalachari for Petitioner.

N. S. Srinivasa Aiyar for Respondent.

P.R.N.

Jackson, J. C.R.P. No. 924 of 1929.
13th November, 1929.

Indian Limitation Act (*IX of* 1908), *Art.* 164—*'Duly served'—Meaning of—Summons affixed to a house where defendant does not reside—If "due service."*

Where the defendant was living and carrying on business at a place far away from his family residence at which his undivided father alone was living and the plaintiff took out summonses to the defendant to his family house which were affixed to the outer door of that house and the Court declared such service was sufficient and passed an *ex parte* decree against the defendant who applied to have the same set aside, more than 30 days after the decree was passed on the ground that he became aware of the decree only within 15 days prior to his application and it appeared that the plaintiff was aware when he took the last of the summonses to the family house that the defendant was not living there.

Held (1) that notwithstanding the prior declaration of the Court that the service was sufficient the defendant was not "duly served," and (2) that the application to set aside the *ex parte* de-

cree though filed more than 30 days after the date of the decree was within time.

Watrap S. Subrahmania Aiyar for Petitioner.

T. Krishnasamy Aiyangar for Respondent.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. S.A. No. 159 of 1926.

13*th November*, 1929.

Contract—Third party—Right of suit of—Sale-deed with direction for payment by purchaser of portion of sale price to seller's creditor—Right of latter to enforce against vendee.

A sale-deed of immoveable property contained a provision reserving a portion of the sale price for payment by the purchaser to the vendor's creditor. The latter taking advantage of the said provision sued the vendor and vendee jointly for recovery of his debt claiming a decree against the vendee also.

Held, that the creditor, being a third party, could not enforce the said provision in the sale-deed against the vendee.

B. Satyanarayana for Appellant.

K. Rajah Aiyar for Respondent.

P.R.N.

Anantakrishna Aiyar, J. S.A. Nos. 540 to 568 of 1928.

18*th November*, 1929.

Madras Estates Land Act, S. 52 (3)*—Landlord exchanging pattas and muchilikas on the basis of cash rents—Assignee from landlord, if can revert to waram rates without exchange of fresh pattas and muchilikas.*

To attract the operation of S. 52, cl. (3) of the Estates Land Act it is not necessary that the landlord who exchanged the pattas and muchilikas and the landlord that claims the new rates should be identical. Where a landlord who was a lessee from the proprietor had exchanged pattas and muchilikas claiming certain cash rents and after the expiry of the lease the assignee of the lessee's interest who had subsequently purchased the estate claimed to revert to waram rates:

Held, he was bound by the old pattas and could not revert to waram rates without exchanging fresh pattas and muchilikas.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Appellants.

T. Rangachariar and *A. Srirangachariar* for Respondents.

N.S.

Wallace, J. S.A. No. 1656 of 1928.
14th November, 1929.

Grant—Conversion of "channel poramboke" lands to "assessed waste"—Right of Government to grant them on Dharkast.

Lands, which were entered as "channel poramboke" in the settlement register, can be converted into "assessed waste" and validly granted on "Dharkast" by the Government.

T. M. Krishnasami Aiyar and *B. C. Seshachallam* for Appellant.

T. R. Venkatrama Sastri and *K. R. V. Sarma* for Respondent.

N.S.

Anantakrishna Aiyar, J. S.A. Nos. 2327 and 2364 to 2402
14th November, 1929. of 1927.

Madras Estates Land Act, S. 52 (2)*—Pattas tendered during the fasli—If sufficient to support a distraint for the arrears of that fasli.*

The words "within 12 months of the Commencement of the period" in S. 52, cl. (2) of the Estates Land Act mean subsequent to the commencement of the fasli and pattas tendered during the fasli and before its expiry are valid and sufficient to support a distraint by the landholder under Chap. VI for the arrears of that fasli.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Appellant.

P. S. Narayanasami Aiyar for Respondent.

N.S.

Wallace and Anantakrishna Aiyar, JJ. S. A. No. 280 of 1928.
20th November, 1929.

Trust—Public or private—Deed, construction of—Civil Procedure Code, S. 92*—Sanction obtained only against one defendant—Maintainability of scheme suit as against other defendants.*

Where, under a deed of settlement, it was provided that income from certain properties should be utilised for conducting charities in a choultry and for the worship of God Subramania installed in the choultry by the executants, and it was further provided that, out of the net income of the said properties, five of the members of the settlor's family should be maintained, and that the properties were to be managed by the settlors during their lifetime, and after their lifetime by their daughter's sons, and, failing such issues, the Government were to be in management and control of the properties.

Held, that what was created was a public charitable trust and not a mere charge over the properties for the benefit of the trust.

Where, in a suit instituted under S. 92 of Civil Procedure Code for framing a scheme in respect of certain charities, the

plaintiff obtained the sanction of the Collector only as against the first defendant and not against the other defendants.

Held, that such want of sanction against the other defendants was not a fatal defect which must entail the dismissal of the suit as against them, and that the Court had jurisdiction to grant time to the plaintiff for obtaining the sanction as against other defendants.

43 M. 755 referred to.

N. Sivaramakrishna Aiyar for Appellant.

R. Kuppusami Aiyar and *T. K. Subramanian* for Respondent.

N.S.

Jackson, J. Cr.R.C. No. 437 of 1929.
21st November, 1929.

Local Boards Act, Ss. 159 (1), 161 (2), 207 (*c*)—*Complaint by Local Board for alleged encroachment—Jurisdiction of Magistrate to decide question of encroachment.*

Where a Union Board instituted a criminal complaint under Ss. 159 (1), 161 (2), and 207 (*c*) of the Madras Local Boards Act, in respect of an alleged encroachment on street poramboke by the accused; and the Sub-Magistrate went into the question of alleged encroachment and dismissed the complaint on the ground that the Union Board had not satisfactorily proved that there was an encroachment.

Held, that the Sub-Magistrate had jurisdiction to decide the question of encroachment and that it was as much incumbent on the Union Board to furnish sufficient materials for a proper disposal before a Sub-Magistrate's Court as before a Civil Court.

N. Somasundaram for Complainant.

S. Jagadisa Aiyar for Accused.

The Public Prosecutor for the Crown.

N.S.

Jackson, J. C.R.P. No. 984 of 1929.
22nd November, 1929.

Hindu Law—Partition—Suit for partition against a minor—If effects a division in states.

The mere institution of a suit for partition against a minor co-parcener might operate as a severance in status; for, inasmuch as a Court could grant a decree for partition in suits instituted on behalf of minors, guardian also could express an unilateral declaration as to severance in status on behalf of minor.

P. Satyanarayana Rao for Petitioner.

V. Govindarajachari for *B. T. M. Raghavachari* for Respondent.

N.S.

Reilly and Cornish, JJ. O.S.A. No. 60 of 1928.
22nd November, 1929.

Banker and customer—Bank paying cheques of the principal endorsed by agent into agent's account—Negligence of Bank in omitting to enquire of principal—Principal later knowing of the payments from the agent—Absence of remonstration by the Principal to the Bank—If amounts to ratification of agent's acts and condoning the conversion—Negotiable Instruments Act, S. 131—*When can be availed of by the Bank.*

In the absence of an account for the principal with the Bank, the Bank paid into the agent's account cheques endorsed by the agent as agent. The principal knew of the agent's so signing. Later the principal opened an account in his own name but the Bank allowed the payments into agent's account to go on, of both crossed and uncrossed cheques.

Held, for an agent to endorse as agent cheques in favour of his principal and then pay them into his own account is a most suspicious proceeding and such a transaction ought to put the Bank on enquiry and an omission to make inquiry of or get authority from principals and to remain content with the reply of the suspected agent is not reasonable but negligent.

(1914) 3 K.B. 356; (1924) 1 K.B. 775 discussed.

But where the principal knew from the agent direct that the agent had been so paying cheques into his own account, and did not disapprove of what he was doing or even so much as expostulate to the Bank, the principal must be deemed to have unequivocally ratified the agent's act and it is immaterial that the principal did not appreciate the legal consequence of such ratification or did not know that the agent was misappropriating to his own use the moneys then credited to his account.

In order to avail itself of the protection given in S. 131, Negotiable Instruments Act, the Bank must show that it acted "without negligence," that is, "without want of reasonable care in reference to the interests of the true owner" in receiving payment of the crossed cheques.

16 T.L.R. followed.

Nugent Grant & O. T. G. Nambiar instructed by *Messrs. Morseby & Co.* for Appellants.

Vere Mockett & G. Rajagopalan instructed by *Messrs. King & Partridge* for Respondent.

N.S.

Kumaraswami Sastri and Walsh, JJ. A.S. No. 223 of 1925.
25th November, 1929.

District Municipalities Act, S. 69—*Farming of tolls without a formal contract as required by the section—Contract not enforceable*

by the Municipality even if the farmer had taken possession—No difference between executed and executory contracts—Quantum meruit allowed.

Though S. 69 of the District Municipalities Act only provides that a contract made otherwise than in conformity with its provisions shall not be binding upon the Municipal Council, it cannot be held that such a contract can be enforced by the Municipal Council as against the other party. No distinction can be made for this purpose between cases where the contract remains executory and those where it has been executed on the part of the Municipality.

30 Mad. 290; 16 I.C. 890; 54 Cal. 969 followed.

45 M.L.J. 164; 28 Bom. 314 doubted.

Distinction between common law corporations and statutory bodies pointed out.

Though the contract as such cannot be enforced, the Municipality may be awarded relief on the basis of quantum meruit, where the other party has enjoyed benefit under the contract.

T. R. Venkatarama Sastriar for Appellant.

S. Varadachariar and *V. Balasundaram* for Respondent.

S.V.V.

Ananthakrishna Aiyar, J. S.A. Nos. 1184 and 1185 of 1926.
26th November, 1929.

Contract Act, S. 74—No interest originally but enhanced interest from date of default—The whole amount also to be paid—Penalty—Court if can award reasonable compensation.

Where a bond for payment of money stipulated that if the money should be paid in regular instalments as they fell due, there should be no interest but if default were committed in any one instalment, then the whole amount due for all the future instalments should be paid with interest at 15 per cent. from the date of the bond.

Held, the provision for payment of the full balance due is valid [*See* S. 74, illustration (*f*)]; but the provision for payment of enhanced interest not from date of default but from the date of the bond is *prima facie* penal and even though originally there was no interest payable and the rate of interest provided for in the document to be paid on default is not exhorbitant.

34 C. 150 (P.C.); 6 M. 167 followed.

36 M. 229 (F.B.) and 10 C.W.N. 1020 referred to.

M. Ramachandra Rao for Appellant.

Ch. Raghava Rao for Respondent.

S.V.V.

Venkatasubba Rao and Madhavan Nair, JJ.
18th November, 1929.

C.M.A. No. 390 of 1929 & L.P.A. No. 106 of 1929.

Provincial Insolvency Act, S. 78 (2)—Defendant adjudicated insolvent pending suit—Official receiver impleaded as party—Decree against insolvent and official receiver—Execution application filed three years after decree—If barred.

Where pending a suit the defendant became an insolvent and the Official receiver was made a party and decree passed against the insolvent and Official receiver, and where, after the adjudication was annulled, an execution application was filed more than 3 years after the date of the decree.

Held, that the application was not barred by limitation as S. 78 (2) of the Provincial Insolvency Act applied to the case.

C. S. Venkatachariar and *D. Ramaswamy Aiyangar* for Appellants.

K. Rajah Aiyar and *K. Venguswamy Aiyar* for Respondents.

N.S.

Venkatasubba Rao and Madhavan Nair, JJ.
26th November, 1929.

R.C. No. 15 of 1928.

City Municipalities Act, S. 110 and Schedule IV, R. 7—Branch office of a company opened in Madras—First year of its opening—Basis of taxation.

Where an incorporated company whose head office is not in the city transacts business in the city through an agent, the company shall be assessed for the first year of its agency on the basis of "zero" income in the year preceding the year of taxation under the proviso to Rule 7 of Sch. I and not on the basis of its paid up capital.

Madhavan Nair, J.—The construction being susceptible of two meanings, the benefit of the doubt must be given to the subject in construing a taxing statute.

K. Bhashyam Aiyangar and *R. Visvanathan* for the Subject.

S. Rajamanickam for the Corporation.

S.V.V.

Venkatasubba Rao and Madhavan Nair, JJ.
26th November, 1929.

C.M.A. No. 269 of 1928.

Registration Act, S. 77—"Making of order," meaning of—If limitation runs from date of signing the order or from the date when it is communicated.

Where an order is passed immediately in the presence of the parties, the order will be deemed to be made then but where it is

passed in the absence of the party, the time begins to run only from the date, when the order is communicated to the party.

An order dismissing a petition as time barred is as much an order of refusal as a refusal to register on the merits.

The Advocate-General (A. Krishnaswami Aiyar) and *V. Ramaswami Aiyar* for Appellant.

T. R. Ramachandra Aiyar and *S. R. Dikshit* for Respondent.

S.V.V.

Wallace, J. S.A. No. 726 of 1926.
28th November, 1929.

Evidence Act, S. 92—Consideration in sale-deed—If evidence can be let in of an oral agreement to pay off a mortgage on the property—If the consideration a term of the contract.

The sale-deed stated "I have sold to you for Rs. 280 the immoveable property, etc." and later added "If in respect of this any dispute arises from any quarter, I shall at my own expense set the same at rest. . . . . In respect of the said property, I have not created as yet any right or interest in favour of any." In fact there was a mortgage which the vendee was obliged to pay and in a suit to recover that amount, the vendor sought to let in evidence an oral agreement at the time of sale to pay the mortgage.

Held, that on the authorities it is open to a party to prove want of consideration or failure of consideration or a difference in the kind of consideration but it is not open to him to prove a variation in the amount of consideration, as the amount of consideration is clearly a term of the contract.

38 Mad. 514; 27 C.W.N. 496 followed.

22 A. 370 and 33 A. 340 explained.

31 M.L.J. 96, 49 M.L.J. 414, 10 L.W. 1 and similar cases have already enlarged too much the opportunities of avoiding S. 92.

G. Lakshmanna for Appellant.

P. Somasundaram for Respondent.

S.V.V.

Curgenven, J. S.A. No. 1214 of 1926.
28th November, 1929.

Evidence Act, S. 90—Will—Construction—Bequest to daughter—"Having been transferred"—If conveys absolute estate or a limited estate—Evidence Act, S. 90—If there is a presumption as to disposing power also.

Where a testator conveys immoveable property in favour of a female other than a wife, and if the words if used in favour of

a male would convey an absolute estate, there is no presumption arising from the sex of the legatee cutting down her right.

50 All. 375 and 47 M.L.J. 723 applied.

2 M.I.A. 7 explained.

But if the donee or legatee is a wife, then the presumption is that she takes it as a limited holder without power of alienation.

Section 90 of the Evidence Act justifies a presumption being raised in favour of the disposing power of the testator.

A.S. Nos. 82 and 295 of 1924 (Phillips and Odgers, JJ.) followed.

47 All. 31 applied.

P. Satyanarayana Rao for Appellant.

K. Kameswara Rao for Respondent.

S.V.V.

Anantakrishna Aiyar, J. S.A. No. 1307 of 1926.
28th November, 1929.

Easements Act, S. 13 (*e*)—*Right of way—Easement of necessity—Dominant owner purchasing a property through which he can reach the dominant tenement—Right of way over servient tenement enjoyed till then as easement of necessity—If by purchase the easement of necessity ceases.*

In considering questions of easement of necessity, convenience is not the test but absolute necessity and in this matter S. 13, cl. (*e*) is the same as the law in England.

28 Mad. 495 and 4 C.L.J. 367 followed.

19 Bom. 797 dissented from.

Right of way of necessity only arises when there is no other possible legal mode of getting at the land and an easement of necessity which arises by implication of law is a grant of a right of way until such time as the grantee may acquire the power from some other source of reaching the quasi dominant tenement.

Holmes v. *Goring*, 2 Bing. 76: 130 E.R. 233 discussed.

English, Indian and American Law reviewed.

G. Lakshmanna for Appellant.

P. Somasundaram for Respondent.

S.V.V.

Kumaraswami Sastri and A.S. No. 199 of 1928.
Pakenham Walsh, JJ.
28th November, 1929.

Easements Act, Ss. 5 *and* 13, *cl.* (*e*)—*Right of way—Discontinuous easement though way claimed over a well-formed and metal road—Easement of necessity.*

In view of the definition in S. 5 of the Indian Easements Act and the terms of S. 13 (e) a right of way cannot be held to pass on a severance of a joint tenement, merely on the ground that up to the date of the severance, the way had for several years been used over a well-formed and metalled road. The decisions in *Alabaster* v. *Brown*, 37 Ch.D. 507, *Head* v. *Meara*, (1912) 2 I.R. 262 and *Nichols* v. *Nichols*, (1900) 81 L.T. 811 cannot be followed in this country in the face of the definition of continuous and discontinuous easements in section 5 of the Easements Act.

In construing an Indian enactment, the cases in England whether prior or subsequent cannot be allowed to control or add to the plain meaning of the statute; nor will it be right to start with the assumption that the Indian statute only intended to enact the English rule.

English and Indian cases on the point reviewed.

A right of way cannot be claimed as an easement of necessity merely on the ground that it is reasonable or convenient or that it is required to enable the parties to enjoy the property in the manner in which it was enjoyed at the time of the severance. In view of the distinction made in S. 13 between clauses (*a*) and (*d*) on the one hand and clauses (*b*), (*c*), (*e*) and (*f*) on the other, a right of way can be claimed as an easement of necessity only if without the way in question, there will be no access to the property.

S. Varadachariar, P. Somasundaram and *K. Umamaheswaran* for Appellant.

The Advocate-General (*A. Krishnaswami Aiyar*) for Respondent.

S.V.V.

Kumaraswami Sastri, J. S.A. No. 1563 of 1926.
4th December, 1929.

Evidence Act, S. 32, *cl.* (6)—*Pedigree—Carved on a stone let into a well—Admissibility—Proof of.*

Where a pedigree was carved on a big slab built into a well which looked as old as the well itself,

Held, a copy of the inscription is admissible under S. 32, cl. (6) of the Evidence Act, and falls under 'other thing on which such statements are usually made.' Under clause (6) it is not necessary to show who it was that made the statements or when.

37 All. 600 followed.

B. Somayya for Appellants.

S. Varadachariar and *S. V. Venugopalachariar* for Respondents.

S.V.V.

Curgenven, J. S.A. No. 1230 of 1926.
3rd December, 1929.

Mortgage—Prior and puisne mortgagee—Prior mortgagee's decree without impleading puisne mortgagee—Puisne mortgagee's decree—Conflict between auction-purchasers in both sales—Right to possession—First mortgage auction purchase pending second mortgagee's suit—Lis pendens—*Whether applicable.*

A first mortgagee obtained a decree for sale on the foot of his mortgage without impleading the second mortgagee. After the first mortgagee's decree but before the sale, the second mortgagee also filed a suit and obtained a decree for sale. The plaintiff's predecessor-in-title purchased the properties in first mortgagee's sale and the third defendant purchased them in the second mortgagee's sale.

Held, the purchaser under the second mortgagee's sale is entitled to possession as against a purchaser under the first mortgagee's decree, as the second mortgagee was not a party to the first mortgagee's suit.

21 M.L.J. 123 (F.B.) and I.L.R. 40 Mad. 77 followed.

Also the sale under the first mortgage decree being pending the second mortgagee's suit, the first mortgagee purchaser's rights are subject to the rights obtained under the second mortgagee's decree and the auction sale thereunder.

K. Bhimasankaram for *B. Satyanarayana* for Appellant.

G. Lakshmanna for Respondent.

S.V.V.

Kumaraswami Sastri, J. S.A. No. 1538 of 1926.
4th December, 1929.

Second Appeal—Interference by High Court on a finding of fact—When allowable—C. P. Code, 1908, *S.* 100 *and O.* 42.

There is a difference between the cases where the High Court can reverse a decision of the Appellant Court on a finding of fact and where the High Court remits the case to the Lower Court asking it to deal with the facts in a way which is more satisfactory.

Where there is no evidence at all (34 All. 579) or where the *onus* is wrongly thrown (52 Mad. 83), the High Court can reverse the judgment of the Lower Court. In cases where material evidence is not considered or there is a mistake in the consideration of such evidence or where there is a misconception as to certain facts or erroneous assumptions not borne out by the record, the High Court has power to call for a revised finding directing him to go into the evidence and come to a conclusion after considering all the evidence and correcting such mistakes as the High Court points out.

N R C

Especially where it is a reversing judgment, the appellate Judge must exercise greater caution.

18 Cal. 28 (P.C.), 46 Cal. 189 (P.C.) and 57 M.L.J. 210 (P.C.) explained.

21 L.W. 227, 24 L.W. 88, A.I.R. 1928 Mad. 826 and A.I.R. 1927 Mad. 1167 followed.

B. Somayya for Appellant.

M. Patanjali Sastri and *C. S. Rama Rao Sahib* for Respondent.

S.V.V.

Wallace and Anantakrishna Aiyar, JJ. S.A. No. 945 of 1926.
4th December, 1929.

Civil Procedure Code, S. 92—Applicability to mutt heads—Matadhipathi of mutt A also matadhipathi of mutt B—Suit for scheme in respect of one mutt alone—Each mutt having separate endowments—Suit if maintainable.

Defendant, the matadhipathi of two mutts *A* and *B*, had his head office at *A* and the suit was brought to remove him from the headship of mutt *B* alone. The two mutts had separate endowments but surplus income from *B* was taken away to *A* and any deficit to *B* was met by *A*.

Held, S. 92 applies to the case of a mutt whose head should be taken to be answerable for maladministration as a trustee in a general sense though he may not be an express trustee in the English sense of the term.

50 Mad. 567 followed.

Also as mutt *B* had separate endowments of its own, the suit was maintainable to remove him from trusteeship of *B* without seeking to remove him from *A*. The trustee would not be entitled to utilise the funds of one trust for the expenses in connection with another trust.

C. S. Venkatachariar for Appellant.

T. Ramachandra Rao for Respondent.

S.V.V.

Wallace and Anantakrishna Aiyar, JJ. S.A. No. 1339 of 1926.
5th December, 1929.

Tariff Act, S. 10—Purchase of salt—Payment of price which included the tariff duty then payable thereon—Subsequent reduction in duty with effect from before the contract date—Seller receiving the difference from the Government—Buyer, if can sue the seller to pay it over to him.

Just as under cl. (*a*) of S. 10 of the Indian Tariff Act, the seller can, in the case of an increase in the duty, sue for and recover and addition in duty, so also a purchaser who under cl. (*b*) is entitled to deduct the equivalent of the decrease of duty or remitted duty when there is a reduction in the duty to take effect from the date of contract, can sue to recover the amount paid to the seller as representing the remission on the bags of salt sold to him. It does not matter that the transaction was "closed" or "settled" between the parties, as the amount representing the remission is an amount which he was not bound to pay to the seller.

52 C. 644 (P.C.) distinguished as a case of revision of tariff value.

47 M. 222 doubted and distinguished.

C. S. Venkatachariar and *V. Rajagopala Aiyar* for Appellant.

K. V. Ramachandran for Respondent.

S.V.V.

Anantakrishna Aiyar, J. S.A. No. 1541 of 1926.
5th December, 1929.

Limitation Act, Art. 142—*Adverse possession—Forest land—Onus of proof—Second appeal—Conclusion to be drawn from proved facts—Question of law.*

Under Art. 142 of the Limitation Act, the plaintiff should file his suit within 12 years from the date of dispossession and for this purpose there is no separate rule for jungle lands. But as in the case of forest lands possession will be presumed to be with the owner, unless the trespasser rebuts it by proving positive acts of possession, the plaintiff should be taken to have been in possession until dispossession is proved by the defendant.

Case-law reviewed.

Whether the facts proved constitute adverse possession is a question of law and the High Court is bound in second appeal to examine whether the conclusions drawn by the Appellate Court from the facts proved are legally sustainable.

19 C. 253 and 21 A. 504 referred to.

K. P. Krishna Menon for Appellant.

O. T. Govindan Nambiar instructed by *Messrs. King and Partridge* and *P. S. Narayanaswami Aiyar* for Respondents.

S.V.V.

Kumaraswami Sastri and Walsh, JJ. A.S. No. 99 of 1925.
5th December, 1929.

Trust—Declaration in a prior suit that it is trust property—Obtained by the alleged trustee—Subsequent alienation by him—

A subsequent representative claiming to set aside the alienation as not binding on trust—Alienee if can plead that it is private property.

In view of the doubt felt as to whether the observations of the Judicial Committee in 34 Mad. 257 are to be taken as overruling the considered view held in 2 C.L.J. 431, the following questions have been referred to a Full Bench:—

1. When a person assuming the position of trustee in respect of property as to which there was no previous dedication obtains from Court a declaration that that property is trust property and acts as such trustee, has he any title to mortgage the property on the footing that it is his private property?

2. Is a subsequent alienee from him entitled to set up a defence in a suit filed by a succeeding trustee for a declaration as to the invalidity of the alienation that the property is not trust property?

The Advocate-General and *A. Ramachandra Aiyar* for Appellants.

P. Chenchiah and *P. Venkatramana Rao* for Respondents.

S.V.V.

Curgenven, J. S.A. No. 924 of 1926.
5th December, 1929.

Hindu Law—Alienation by mother as guardian of a minor widow—Renewal by widow after attaining majority—Suit by reversioners to declare the later alienation as not binding on reversion for want of necessity—If they should also get the prior alienation by guardian declared invalid.

During the widow's minority, the mother as guardian executed a mortgage over the widow's property, which mortgage was ratified and renewed by the widow after attaining majority. The reversioners filed a suit for a declaration that the renewed mortgage was invalid.

Held, the alienation by the mother as *de facto* guardian of the widow, though not for a necessity, is only voidable and therefore can be ratified by the widow under Hindu Law. It is well settled that a *de facto* guardian can alienate for necessity and that connotes power in the *de facto* guardian to deal with the property and no distinction is drawn between the *de facto* and *de jure* guardians with regard to the powers of alienation.

49 M. 768 followed.

38 M. 1125 distinguished as *obiter* and A.I.R. 1928 M. 226 as a case of necessity.

K. Kameswara Rao for Appellant.

V. Govindarajachari for Respondent.

S.V.V.

Jackson, J. Cr.R.C. Nos. 571 and 572 of 1929.
5th December, 1929.

Criminal Procedure Code, S. 247—Case called on a date fixed for hearing—Accused present but complainant absent by mistake as to date of hearing—Acquittal recorded under S. 247—Bench of Magistrates if can re-open the order of acquittal.

A case which was entered in the registers as posted to the 1st March was called by the Bench of Magistrates hearing it on that date but as the accused alone was present and the complainant was absent, the Magistrates recorded an acquittal under S. 247. On the 5th the Magistrates set aside the acquittal and proceeded with the trial on the ground that the complainant was absent on a mistaken impression as to the date and the Bench also intended the 5th, though noted the 1st as the date of hearing.

Held, that the order of acquittal cannot be treated as a nullity and set aside by the same Magistrates who passed the order of acquittal.

42 C. 365 not approved as based on a misreading of 2 Weir 307, where the order was not set aside by the original Magistrates but by the High Court in revision. But in view of the importance of the question, the case has been referred to a Bench.

A. Viswanatha Aiyar and *A. Ramaswami Aiyar* for Petitioner (Accused).

The Public Prosecutor for the Crown.

S.V.V.

Wallace and Anantakrishna Aiyar, JJ. S.A. No. 304 of 1926.
10th December, 1929.

Limitation Act, Arts. 132 *and* 148—*Prior and subsequent mortgages—Suit by prior mortgagee without impleading second mortgagee—Sale in execution of that decree—Subsequent suit by the second mortgagee impleading mortgagor alone—Purchase by mortgagee himself—Suit to redeem by the second mortgagee—Article applicable.*

The assignee of the interests of the second mortgagee sued to redeem the first mortgage. The defendant was the purchaser in execution sale in pursuance of the first mortgagee's decree. The second mortgagee was not a party to the first mortgagee's suit. The second mortgagee also had brought a suit on his own mortgage against the mortgagor and purchased the equity of redemption in execution. The auction purchaser was made a party but as he claimed a title paramount, he was exonerated.

Held, Art. 148 applied to the case.

47 M.L.J. 602 and 20 L.W. 620 dissented from as 14 C.W.N. 439 which is relied on in those cases has been overruled by 33 C.W.N. 1067 (F.B.) and not approved in the other High Courts also.

V. N. Venkatavaradachariar for Appellant.

V. Ganapathi Ayyar for Respondent.

S.V.V.

Wallace, J. S.A. No. 1176 of 1926.
13th December, 1929.

Estates Land Act, S. 42—*Tenant to pay a rent on the basis of his enjoying a certain number of acres—Tenant actually found to be enjoying more on measurement—Suit for arrears of rent on the excess area enjoyed—If can be treated as a suit for damages for use and occupation.*

A suit, not for ejectment, but as for arrears of rent due on the ground that the tenant was enjoying more extent than was agreed on and that the rent on the excess was not included in the actual rent he paid, is a suit for additional rent for land proved to be in excess of the area for which rent has been previously paid by him within the meaning of S. 42 of the Estates Land Act, 1908 and must be filed before the Collectors and cannot be treated as a suit for damages for use and occupation.

B. Jagannadha Das for Appellant.

G. Lakshmanna and *A. Venkatachalam* for Respondents.

S.V.V.

Wallace, J. S.A. No. 992 of 1925.
13th December, 1929.

Transfer of Property Act, S. 52—Lis pendens—*Auction purchaser in execution of a money decree—Debt binding on estate—Purchase pending the suit for maintenance claiming charge—Purchaser in execution of maintenance decree—If purchase in execution of money decree prevails over maintenance sale.*

The question whether the right of the auction purchaser in execution of a money decree for a debt binding on the estate prevails over the rights of the auction purchaser in execution of a decree creating a charge in favour of a maintenance holder when the execution sale under money decree is prior in date to the sale in execution of the maintenance decree but subsequent to the date of the plaint in the maintenance suit was referred to a Bench with an expression of opinion in favour of the view in 29 Mad. 508 that as the sale under the money decree is for a debt binding on the estate, it is not affected by *lis pendens.*

G. Lakshmanna for Appellant.

K. Kameswara Rao for Respondent.

S.V.V.

[END OF VOL. LVII.]